TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 109.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PLAINTIFF, IN ERROR,

vs.

HAMILTON HOUSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 6, 1875.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1874, thereof, between Hamilton Houston, plaintiff, and The Chicago, Rock Island & Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Chicago, Rock Island and Pacific Railroad Company, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk C. C. U. S., Missouri Districts.

Allowed by—

JOHN F. DILLON, *Judge.*

b UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the command of the within writ, the court has duly searched the record and proceedings of the said court in the cause aforesaid, and the foregoing is a full transcript of the whole proceedings therein, without any diminution or addition thereto, and which said transcript is herewith transmitted to the said Supreme Court.

In witness whereof the clerk of said circuit court has hereto subscribed his name and affixed the seal of said court this 16th day of December, A. D. 1874.

[SEAL.]

M. M. PRICE, *Clerk,*
By C. M. WARD, *Deputy.*

(Indorsed:) No. 196. United States circuit court, districts of Missouri. Hamilton Houston vs. The C., R. I. & P. R. R. Co. Writ of error to the district court of the United States for the eastern district of Missouri. Returned and filed , 187 . , clerk.

c The United States of America to Hamilton Houston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second

Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein the Chicago, Rock Island & Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the western district of Missouri, this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN F. DILLON,
Judge United States Circuit Court Western District of Missouri.

The plaintiff, Hamilton Houston, hereby waives formal service of the within citation.

HARWOOD & CHALKER,
CHANDLER & SHERMAN,
Attorneys for Plaintiff.

NOV. 21ST, 1874.

(Indorsed:) United States circuit court, west. district of Missouri. Hamilton Houston vs. The C., R. I. & P. R. R. Co. Citation. Filed , 187 . , clerk.

1 In the circuit court of the United States for the western district of Missouri.

Be it remembered that on the 17th day of November, 1873, there was filed in the office of the clerk of said court a certain transcript from the circuit court of Clinton County, in the State of Missouri; which said transcript is in words and figures as follows, to wit:

HAMILTON HOUSTON
against
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Company.

STATE OF MISSOURI,
County of Clinton, ss:

Be it remembered that on the 11th day of March, A. D. 1873, in vacation, the plaintiff in the above-entitled cause, by his attorney, filed in the office of the clerk of the circuit court of Clinton County his petition; which said petition is in words and figures as follows, to wit:

Petition.

In the circuit court of Clinton County, State of Missouri, April term A. D. 1873.

HAMILTON HOUSTON, PLAINTIFF,
against
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Company, a corporation, defendant.

Plaintiff states that the defendant herein is now, and was on and before the 13th day of December, A. D. 1872, a consolidated rail.

2 road corporation, composed of the Chicago and Rock Island Railroad Company, a railroad duly incorporated by the laws of the State of Illinois, and the Chicago, Rock Island and Pacific Railroad Company, a railroad company duly incorporated by the laws of the State of Iowa; which said companies subsequent to their respective incorporation, and before the date aforesaid, consolidated under the corporate name of Chicago, Rock Island and Pacific Railroad Company.

That on said 13th day of December, A. D. 1872, the said defendant was operating a railroad known as the Chicago and Southwestern Railroad through various parts of Missouri, and, among others, the town or village of Cameron, in the county of Clinton, in said State, by running, conducting, and managing locomotives, cars, and trains of cars thereon; that on and before said 13th day of December, A. D. 1872, there were employed by said defendant certain officers, agents, servants, and employees to run, conduct, and manage locomotives, cars, and trains of cars upon and over said Chicago and Southwestern Railroad through the State of Missouri as aforesaid; that on said 13th day of December, 1872, while said officers, agents, servants, and employees of defendant were running, conducting, and managing a certain locomotive car and train of cars, to wit, the evening passenger-train going east upon said Chicago and Southwestern Railroad and through the said town of Cameron, they, the said officers, agents, servants, and employees of defendant, did, by negligence, unskilfulness, and criminal intent upon their part, run said locomotive car and train of cars against, upon, and
3 over one Mary Houston, in said town of Cameron, and then and there and thereby crushed, mangled, and mutilated her, the said Mary Houston, from which crushing, mangling, and mutilating she, the said Mary Houston did, on the said 13th day of December, A. D. 1872, then die; that at the time of running said locomotive car and train of cars against, upon, and over the said Mary Houston, as aforesaid, the said locomotive car and train of cars were under the management and control of said officers, agents, servants, and employees of defendant as aforesaid.

Plaintiff states that on said 13th day of December, and at the time of said injury and death of said Mary Houston, he was the lawful husband of said Mary Houston; wherefore, by virtue of the second section of the act for "the better security of life, property, and character," chapter forty-three, Wagner's Missouri Statutes, plaintiff demands judgment against defendant for five thousand dollars damages, and for costs of suit, and for all other proper relief.

HARWOOD AND CHALKER,
Attorneys for Plaintiff.

Upon which said petition a summons issued, which said summons is in words and figures as follows, to wit:

Summons.

STATE OF MISSOURI,
County of Clinton, ss:

The State of Missouri to the sheriff of Clinton County, greeting:

We command you to summon Chicago, Rock Island and Pacific Railroad Company, a corporation, that it be and appear in our circuit court, to be held at the court-house in the city of Plattsburg, in said
4 county, on the 5th Tuesday of April next, 1873, then and there, before the judge of our said court, to answer the petition of Ham-

ilton Houston, (a certified copy of which said petition is hereto annexed,) and this you shall in no wise omit, and have you then and there this writ.

Witness my hand as clerk of said court, and the seal thereof. Done at office in Plattsburg, in the county aforesaid, on the 13th day of March, A. D. 1873.

[L. S.] THO'S G. BARTON, *Clerk.*

And endorsed on said summons is the following return, to wit:

Return.

Served the within summons by leaving a copy thereof, and also a copy of the annexed petition, at the business office of the within-named defendant, in the county of Clinton, State of Missouri, with John D. Bell, the person having charge of said office, this 17th day of March, A. D. 1873, the president and other chief officers of said defendant not being found in said county.

W. F. DAVIS,
Sheriff Clinton County, Mo.

And afterwards, to wit, on the 29th day of April, A. D. 1873, at and during a regular term of the circuit court of Clinton County, Missouri, the following among other proceedings were had and entered of record, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Now here, on application of plaintiff, leave is granted him to amend his petition herein by interlineation.

And afterwards, to wit, on the 30th day of April, A. D. 1873, at and during the same term of said court, were had and entered of record in said cause the following further proceedings, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Damages.

Come now the defendant in the above-entitled cause, by its attorney, and presents to the court here its demurrer to plaintiff's petition herein which said demurrer is now here by order of the court filed.

Said demurrer is in words and figures as follows, to wit:

Demurrer to petition.

In the circuit court of Clinton County, Missouri, April term, A. D. 1873.

HAMILTON HOUSTON, PLAINTIFF,
against
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company, defendant.

Comes now the defendant and demurs to the petition of the plaintiff in this cause for the following grounds of objection:

First. Because the petition does not state facts sufficient to constitute a cause of action.

J. H. SHANKLIN,
Att'y for Def'ts.

And afterwards, to wit, on the 2d day of May, A. D. 1873, at the same term of said court, were had and entered of record in said
6 cause the following further proceedings, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Damages.

Now here, on application of the defendant, leave is granted him to answer the said plaintiff's petition herein, sixty days before the next term of this court, until which time this cause is, by order of the court, continued.

And afterwards, to wit, on the 3d day of May, A. D. 1873, at the same term of said court, were had and entered of record in said cause the following further proceedings, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Damages.

Now here it is ordered by the court that the entries and orders heretofore made in this cause be, and they are hereby, set aside.

And afterwards, to wit, on the same day, at the same term of said court, were had and entered of record in said cause the following further proceedings, to wit:

Order for removal.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Damages.

Upon this day of the present term, it being the appearance term of this court, come the said defendant, by J. H. Shanklin, its attorney, and having entered its appearance in this action and filed its petition
7 praying, for reasons therein alleged, for the removal of said cause to the circuit court of the United States, and the court being fully advised in the premises, do find the several matters and things set forth to be true, as therein alleged.

And the court do further find that said cause is one which may properly be so removed to said circuit court according to the Constitution and laws of the United States. It is therefore ordered and adjudged that said defendants file their bond with the clerk of this court in the sum of five hundred dollars, conditioned for the filing of the papers in said cause in the circuit court of the United States for the western district of Missouri, on the first day of the next term thereof, and that thereupon said cause be removed to said court for trial.

And afterwards, to wit, on the same day, at the same term of said court, were had and entered of record in said cause the following further proceedings, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Damages.

Comes now the defendant in the above-entitled cause, by his attorney, and presents to the court here its bond in the sum of five hundred dollars for a change of forum to the circuit court of the United States for the western district of Missouri, which said bond is by the court approved and by order of the court filed.

8 Said petition, affidavit, and bond are in words and figures as follows, to wit:

Petition for removal.

In the circuit court of Clinton County, State of Missouri.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

To the honorable circuit court of Clinton County, State of Missouri:

The petition of the Chicago, Rock Island and Pacific Railroad Company of the States of Illinois and Iowa respectfully shows:

That your petitioner is a corporation formed by the consolidation of the Chicago and Rock Island Railroad Company, created and existing under the laws of the State of Illinois, and the Chicago, Rock Island and Pacific Railroad Company, created and existing under the laws of the State of Iowa; that said consolidation was formed and exists under the laws of the said States of Illinois and Iowa; that your petitioner is the defendant in the above-entitled cause; that the same was brought by Hamilton Houston, plaintiff, on or about the 13th day of March, one thousand eight hundred and seventy-three, in the circuit court of Clinton County, Missouri, to be held in said county; that the said plaintiff was at the time of bringing this suit a citizen of the State of Missouri, and your petitioner is and was at the time of bringing this suit a citizen of the States of Illinois and Iowa; and your petitioner further respectfully shows that *that* the matters in controversy in this suit is between the said Hamilton Houston, a citizen of the State of Missouri, and your petitioner, the defendant in said suit, a citizen of the

9 States of Illinois and Iowa; and, further, that the said plaintiff claims in the petition in this suit as damages against your petitioner the sum of five thousand dollars, and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

Now, your petitioner further respectfully represents that this suit has not been tried, but that the same is now pending for trial in said court in said county, and that your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the western district of Missouri, in the eighth circuit, in pursuance of a provision of the act of Congress approved July 27th, 1866, entitled "An act for the removal of causes, in certain cases, from the State courts," as amended by the act of Congress approved March 2d, one thousand eight hundred and sixty-seven, entitled "An act amendatory of the act entitled "An act for the removal of causes in certain

cases from the State courts, approved July 27th, 1866," and your petitioner says that it has made and filed an affidavit required by said amendatory act, a certified copy of which is herewith annexed, marked "Exhibit A," which it prays may be taken as a part of this petition, and that it is ready and willing to give such good and sufficient surety as the court may direct for its doing all acts and things required to be done by the said provision of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by John H. Shanklin, of Grundy County, Missouri, as surety, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in the next circuit court of the United States, held in the western district of Missouri, in the eighth circuit, on the first day of its session, copies of all proceedings, pleadings, depositions, testimony, and other proceedings in said suit, and all such other acts as the said acts of Congress requires to be done upon the removal of a suit into the United States circuit court; and your petitioner therefore prays that the said bond may be accepted as a good and sufficient surety according to said provisions of law, and that said suit may be removed to the next United States circuit court, to be held in the western district of Missouri, in the eighth circuit, pursuant to the statutes of the United States in such cases made and provided; and that no further proceedings may be held therein in said circuit court.

And your petitioner will ever pray.

J. H. SHANKLIN,
Att'y for Def't.

UNITED STATES OF AMERICA, *ss:*

Hugh Riddle, being duly sworn, deposes and says that he is vice-president and general superintendent of the Chicago, Rock Island and Pacific Railroad Company, the petitioner in the foregoing petition, and that he has heard said petition read and knows the contents thereof, and that the matters and things therein alleged are true, as he verily believes.

HUGH RIDDLE.

Subscribed and sworn to by Hugh Riddle, before me, William H. Bradley, clerk of the circuit court of the United States of the northern district of Illinois, this 30th day of April, 1873.

As witness my hand and official seal, at Chicago, in said district.

[L. S.] WM H. BRADLEY, *Clerk.*

Bond.

In the circuit court of Clinton County, in the State of Missouri.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company. } Bond.

We, the Chicago, Rock Island and Pacific Railroad Company, of the States of Illinois and Iowa, as principal, and John H. Shanklin, of Grundy County, Missouri, as surety, is and are firmly bound unto Hamilton Houston in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Hamilton, his sucsor or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals this 3d day of May A. D. 1873.

Whereas a suit was brought on or about the 13th day of March, one thousand eight hundred and seventy-three, in the circuit court of Clinton County, Missouri, by the said Hamilton Houston, against the Chicago, Rock Island and Pacific Railroad Company; that the same is now pending in said court in said county, and is removable to the circuit court of the United States for the western district of Missouri, in the eighth circuit under the act of Congress approved July 27th, one thousand eight hundred and sixty-six, entitled "An act for the removal of causes in certain cases from the State courts," and as amended by the act of Congress approved March 2nd, one thousand eight hundred and sixty-seven, entitled "An act to amend an act entitled 'An act for removal of causes in certain cases from the State courts,"' approved July 27th, 1866; and whereas the Chicago, Rock Island and
12 Pacific Railroad Company has filed in said circuit court an affidavit required by the amendatory act, and have filed its petition in said circuit court for said Clinton County for the removal of said suit into the next United States circuit court to be had in the western district of Missouri:

Now, therefore, the condition of the above obligation is such, that if the above bounden Chicago, Rock Island and Pacific Railroad Company, or its legal representatives, shall enter, or cause to be entered, in the circuit court of the United States for the western district of Missouri, on the first day of its session next ensuing, the order of said circuit court for said Clinton County for the removal of said suit into said court, copies of all papers, pleadings, depositions, testimony, and other proceedings in said suit, and do all acts to be done, and such other preparitory acts as by said act of Congress approved July 27th, 1866, are required to be done upon the removal of a suit into the United States court, then the above obligation is void; otherwise to remain in full force and virtue.

Chicago, Rock Island and Pacific Railroad Company,
By HUGH RIDDLE,
Vice-Pres't and Gen'l Sup't.
J. H. SHANKLIN.

STATE OF MISSOURI,
County of Clinton, ss:

John H. Shanklin, surety in the above obligation named, being duly sworn, deposes and says, that he is a resident of the State of Missouri, and a landholder therein, and is worth at least the sum of five thousand dollars, over all his just debts and liabilities, and exclusive of property exempt by law from execution.

J. H. SHANKLIN.

13 Subscribed and sworn to before me this 3d day of May, 1873.
THO'S H. BARTON, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify that on this 30th day of April, 1873, before me personally appeared Hugh Riddle, to me personally known to be the pe'son who described in and who executed the foregoing instrument as the vice-president and general superintendent of the Chicago, Rock Island and Pacific Railroad Company, and is personally known to me to be such vice-president and general superintendent, and who acknowledged to me that he executed the same as

the free act and deed of said general company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court at office at Chicago, in said district, the day and date last aforesaid.

[L. S.] W'M H. BRADLEY, *Clerk.*

In the circuit court of Clinton County, State of Missouri.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Hugh Riddle, being duly sworn, deposes and says that he is a citizen of the State of Illinois, and resides in the city of Chicago of said State, and that he is the vice-president and the general superintendent of
14 the defendant in the above-entitled action, and as has general charge and control of all its business in the States of Illinois, Iowa, and Missouri; that said action has been brought on or about the 13th day of March, 1873, in the circuit court of Clinton County, in the State of Missouri; and this defendant further says that he has reason to believe and does believe that from prejudice and local influence the said defendant will not be able to obtain justice in said court, and therefore he makes this affidavit for the purpose of removing said suit to the circuit court of the United States for the western district of Missouri, in the eighth circuit, in pursuance of the statute of the United States in said cases made and provided, and further said deponent saith not.

HUGH RIDDLE.

Subscribed and sworn to by Hugh Riddle before me, William H. Bradley, clerk of the circuit court of the United States in and for the northern district of Illinois, this 30th day of April, 1873.

As witness my hand and the seal of said court, at my office in said northern district, the and date last aforesaid.

[L. S.] W'M H. BRADLEY, *Clerk.*

In the circuit court of Clinton County, State of Missouri.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Upon reading of the petition of the above-named Chicago, Rock Island and Pacific Railroad Company, defendant herein, for the removal of this suit into the circuit court of the United States for the
15 western district of Missouri, in the eithth circuit, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing of the security offered by said defendant, according to the requirements of said laws, and on motion of J. H. Shanklin, attorney for said defendant, it is hereby ordered that the said security be accepted, and that said suit be removed into the next circuit court of the United States, in the western district of Missouri, and that no further proceedings be had in said suit in this court.

Witness the honorable Philander Lucas, judge of the said circuit court of Clinton County, Missouri, and the seal thereof, this 3d day of May, 1873.

[L. S.] PHILANDER LUCAS, *Judge.*

And be it further remembered that at a regular term of the circuit court of the United States, within and for the western district of Missouri, begun and held at the city of Jefferson, on the third Monday in November, 1873, the following proceedings were had, on the 18th day of said month, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Now comes the defendant, by its attorney, Willard P. Hall, and files answer to the petition herein; which said answer is in words and figures as follows, to wit:

16 *Answer.*

HAMILTON HOUSTON
against
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

The defendant, for answer to plaintiff's petition, denies that the officers, agents, servants, or employees of defendant, did, by negligence, unskillfulness, or criminal intent upon their part, or on the part of either of them, run the locomotive, car, or train of cars of defendant, or either of them, against, upon, or over one Mary Houston, or that thereby they then and there crushed, mangled, or mutilated her the said Mary Houston, as is alleged in said petition.

And for a further answer this defendant says that said injuries and death of said Mary Houston was occasioned by her own carelessness, negligence, and recklessness, and not the fault or negligence of defendant or its employees, & that said injuries and death could and would have been avoided by the exercise of ordinary care & prudence on her part.

WILLARD P. HALL,
Att'y for Def't.

And afterwards, to wit, at said term of said court, and on the 21st day of November, 1873, the following appears of record in said cause, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

17 And now comes the plaintiff, by his attorneys, and files replication to the answer herein, and thereupon it is ordered by the court that this cause be continued until the next term of this court.

And which said application is in words and figures as follows, to wit:

Reply.

HAMILTON HOUSTON, PLAINTIFF,
against
THE CHICAGO, ROCK ISLAND AND PACIFIC
Railroad Company.

Plaintiff for reply to the new matter set forth in defendant's answer herein denies that the injuries and death of Mary Houston were occasioned by her carelessness, negligence, or recklessness, or that she was careless, negligent or reckless at the time said injuries and death were caused by defendant, its agents, or employees; denies that said injuries to and the death of said Mary Houston were caused or occasioned or would have occurred without the fault, carelessness, or negligence of defendant, its agents, servants, or employees; denies that said injuries and death could and would have been avoided by the exercise of ordinary care and prudence on the part of said Mary Houston; denies that there was any lack or want of prudence on the part of said Mary Houston at the time said injuries and death occurred. Wherefore plaintiff renews his prayer for judgment according to his petition.

E. L. EDWARDS,
CHANDLER & SHERMAN, AND
HARWOOD & CHALKER,
Att'ys for Pl'ff.

18 And afterwards, to wit, at the November term, 1874, (the said cause having been continued at the April term, 1874,) of said court, the following proceedings were had in said cause, on the 19th day of said month, to wit:

Jury.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC
Railroad Company.

Now come the parties by their attorneys, the plaintiff by Chalker & Chandler, and the defendant by Hall & Shanklin, and thereupon come a jury, to wit, W. S. Freshour, A. E. Page, C. W. Burt, G. W. Duncan, J. S. Sterrett, R. Kulmbach, W. W. Jessee, J. B. Barnett, W. B. Rogers, F. M. Gideon, and Terhune, twelve good and lawful men, duly elected, sworn, and empannelled, well and truly to try the issues presented, a true verdict render, and this cause not being completed, and the court being about to adjourn, it is ordered that this cause be continued until to-morrow morning at nine o'clock.

And on the 20th day of November, 1874, at the same term of said court, the following further proceedings were had, to wit:

Judgment.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC
Railroad Company.

Now again come the said parties, by their attorneys, the plaintiff by Harwood, Chalker and Chandler, and the defendant by Hall & Shank-

lin, and thereupon come the jury aforesaid, to wit, W. S. Freshour, A. E. Page, C. W. Burt, G. W. Duncan, J. S. Sterrett, R. Kulmbach, W.
19 W. Jessee, J. B. Barnett, W. B. Rogers, F. M. Gideon, and Adam Terhune, who, upon their oaths, return into court, here, the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess his damages at the sum of five thousand dollars.

"W. B. ROGERS, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover against the said defendant, as well the said sum of five thousand dollars, the damages by the jury aforesaid assessed, as also the costs and charges herein laid out and expended, and have thereof execution.

And afterwards, to wit, at the same term of said court and on the 21st day of November, 1874, the following appears of record in said cause, to wit:

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Now comes the defendant, by its attorneys, Hall & Shanklin, and presents to the court its bill of exceptions, which is allowed, signed, and ordered to be filed, and on motion of defendant's said attorneys, a writ of error is allowed herein, and defendant has leave to file supersedeas bond within sixty days.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of exceptions.

In the circuit court of the United States for the western district of Missouri, in the eighth circuit, November term, 1874.

20 HAMILTON HOUSTON, PLAINTIFF,
against
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company, defendant.

Be it remembered that on the trial of the above-entitled cause the following proceedings were had, to wit:

The issues having been submitted to a jury, the plaintiff, to maintain the issues on his part, offered in evidence the depositions of Ella Houston, Bettie Houston, John Kerwin, Mary Havey, Thomas Collins, William Greenhalgh, Andrew O. Risley, Michael Trainor, A. F. Ely, Edward Sprague, John Scholtenhamer, and Jacob Dwyer, which said depositions were in words and figures as follows, to wit:

ELLA HOUSTON:

My name is Ella S. Houston; my age is sixteen years. On the evening of the 13th day of December, A. D. 1872, at about ½ past six o'clock, a little boy came to our door, and gave the alarm that M'r's Shea was killed on the track. We ran out to the wagon-road and M'r's Havey

told us that it was our mother, and when we got to where she was, near the railroad-track, we found it to be our mother. M'r's Heavy was holding her up. M'r's Heavy, my sister Elizabeth, and I carried her to the wagon-road towards the house, then some men come and carried her to the house in which we lived. After getting her in the house we placed her upon a bed, and she died in a few minutes. William Harvey is the name of the little boy that gave the alarm at our door. This all occurred in the town of Cameron, in Clinton County, and State of Missouri. I saw the train of cars come in that evening on the Chicago, Rock Island and Pacific Railroad, at about half after six o'clock, going east, and soon after I saw it the boy gave the alarm at our door; we immediately ran out and found mother as before stated. I first noticed the train near where the United States Hotel stood, opposite the junction depot on the Hannibal and Saint Joseph Railroad. The bell attached to the engine was not being rung nor the whistle blowing. When I saw the train I was standing at our kitchen-door; the bell was not rung nor the whistle blown at any time when I saw the train. I looked at the train all the time it was coming in, until it got opposite the corner of our garden. I did not know where mother was at the time I saw the train coming in. I found mother in the ditch, near the track of the Chicago, Rock Island and Pacific Railroad, on the south side of the track. The plaintiff, Hamilton Houston, is my father. I expect to leave here and go to the east, to the State of Illinois, to live, next Sunday.

Cross-examined:

I think it is about one hundred and fifty feet from the nearest part of our house to the track of the Chicago, Rock Island and Pacific Railroad, and about two hundred feet from where I stood in the kitchen-door. I think it is about four hundred and fifty to five hundred feet from where I was standing to where the United States Hotel stood. The reason I noticed the bell was not ringing or the whistle blowing was that the train was coming so fast, and I said to my sister, "Now, Betty, if any person was on the track they could not get off or out of the way of that train." The place where I first found mother, near the track, was about twenty feet east of a line due south from our house. My mother's name was Mary Houston.

BETTY HOUSTON:

My name is Betty Houston. I am fourteen years old. I live in Cameron, Clinton County, Missouri. I am a daughter of Hamilton Houston, the plaintiff. I expect to leave this place next Sunday evening and return to the State of Illinois, my former home, where I expect to remain. On Friday evening, December the 13th, A. D. 1872, my mother left our house, about half past six o'clock—I mean the house where we live in, in Cameron, Clinton County, Mo. She took a pail and went after a pail of water, across the street and the Chicago, Rock Island and Pacific Railroad track—(I do not recognize the points of compass here.) [The same were explained to the witness]—south of our house. She went to a well east of the section-house, on the Chicago, Rock Island and Pacific Railroad, to get water. The well is fifteen or twenty feet south of the railroad-track of the Chicago, Rock Island and Pacific Railroad, and about ten or fifteen feet east of the section-house. I was in the habit of going to that well for mother. There was a path or crossing that we always followed across the railroad-track, except when there was cars there. There were ties placed over the ditches where we crossed the track. I saw mother when she left the house that evening to go after

water. I did not see her after she got out of the house until I saw her in the ditch on the opposite side or south side of the track, and near to the track of the Chicago, Rock Island and Pacific Railroad, about
23 two feet from the track. I did not see the train coming in that evening. Mother had been gone two or three minutes from the house when I learned that the accident had happened.

Cross-examined:

The section-house referred to in my direct examination is not within the switch, and in going to the well I referred to, we crossed but one track; it is not between two tracks of the Chicago, Rock Island and Pacific Railroad. I know the track of the Hannibal and Saint Joseph Railroad and the Chicago, Rock Island and Pacific Railroad apart. It is about thirty or forty feet between them. The section-house and well is between the tracks of the Chicago, Rock Island and Pacific and the Hannibal and Saint Joseph Railroad. There was three ties across the ditch where we crossed, but there was no plank or other crossing directly on the track or between the rails. There was ties across the ditch on both sides of the track. I was in the kitchen when mother started after water.

Re-examined:

When I stated in my cross-examination that we crossed but one track, or the section-house was not within the switch, I meant that there was no switch or track of any other railroad but the Chicago, Rock Island and Pacific Railroad. In going from our house to the well near the section-house before referred to, we have to cross the main track, and also a switch-track of the Chicago, Rock Island and Pacific Railroad.

Recross-examined:

24 We have to cross two tracks of the Chicago, Rock Island and Pacific Railroad in going to the well referred to. They are near together; about two feet, I think. I don't know how far it is from the crossing to where the switch branches off from the main track. I think it is not a hundred yards. I don't remember whether the end of the switch is in sight of the crossing or not. I never noticed it. There is no ditch between the switch and the main track. The ditches are about fifteen or twenty feet apart. I think the main track is nearer to the house we live in. The track nearest to the section-house is the main track. I think it is about ten or fifteen feet from the ditch on the south side of the tracks to the section-house. The ditch where I saw mother was next to the section-house. This is the ditch of the main track.

Re-examined:

My mother had no bonnet or shawl on that evening when she started after water. She had nothing on her head. There never has been any bonnet or shall brought to our house since mother died that I know of. When the private path or crossing before referred to by me was blocked up with cars, we went to the street-crossing west of it to cross the railroad-tracks when we went after water.

Recross-examination:

It is about twenty or thirty feet from the path to the street-crossing west of it. I remember that mother had nothing on her head that evening when she went after water. I did not see her after she went
25 out of the kitchen. It was almost half after six o'clock. I think it was after dark.

JOHN KERWIN:

My name is John Kerwin. I am twenty-three years old. I am employed on the Chicago, Rock Island and Pacific Railroad, as conductor and foreman on a construction-train. I don't recollect the date of M'r's Houston's death, but I recollect the circumstances. I saw her that evening, some time between six and seven o'clock in the evening, about fifteen feet north of the side-track of the branch of the Chicago, Rock Island and Railroad track, opposite the house in which she lived, in Cameron, in Clinton County, Missouri. When I got there she was lying on the ground. Some women and children were making *so* alarm. Her daughters were there. I had just cleared the main track with my train, and was on the side-track when the passenger-train came in, and I heard the alarm and went to see what was the matter. My train had been running to the west at the time I was side-tracking. I cannot tell which end of the train the engine was at, but to the best of my recollection it was at the east end, and the train was backing in on the side-track. My train stood on the east end of the side-track when the passenger-train passed it. I know where the section-house and well is that is spoken about or referred to the Miss Houstons previously examined. I was putting my train on the side-track not very far from the section-house and well. I could not say whether any portion of my train stood opposite to the section-house or not, at the time the passenger-
26 train came in that evening. I mean No. six, on the Chicago, Rock Island and Pacific Railroad. The*re* time at Cameron, going east, was half past six o'clock p. m. I don't know whether the train was on time or not. I think my train was standing at the time the passenger-train came in; that is my opinion. I cannot say whether any servant or employee of the road called my attention to the accident that had happened or not. When I first heard of the accident I was about two or three hundred feet from where I found M'r's Houston. I think I was somewhere around the caboose or train when I first heard of it. When I learned of the accident I assisted in carrying the lady to the house, and done all I could to relieve her. I cannot say what the engineer of the No. six passenger-train said to me. There was considerable excitement. He told me to help carry the lady to the house. I first saw the engineer of No. six on his engine. I don't remember whether I had any conversation with him before I got to where M'r's Houston was or not. I might or might not. The name of the engineer that was on No. six that evening was Thomas Carhart. I think he and I went part of the way from where I was up to where M'r's Houston was lying.

MARY HAVY:

My name is Mary Harvey. I am forty years old. I live in Cameron, Clinton County, Missouri. I live in the section-house on or near to the railroad they call the "Southwestern." The house I live in is on the contrary or opposite side of the railroad-track from the one where M'r Houston, the plaintiff, lived in. On a certain Friday, last winter,
27 one of my children came and told me that M'r's She was in the ditch. I went out and asked, "Is that you, M'r's Shea?" and when I got to her I found it to be M'r's Houston. She was in the ditch near to the track of the railroad—between my house and the track—about twenty feet from my house in the direction of the street-crossing west of my house. The ditch where she was lying in is about three or feet from the railroad-track. She was lying in the ditch face downward. I sent my son Willie to M'r Houston's house, to tell the girls to come and help get her out. They came over—Ella and Belsy—and we

took her up and carried her across the track in the direction of the house. She was in a helpless condition. When I first spoke to her she did not answer; but when we carried her across the track she told us to let her down. Then some men come and removed her to her house. We placed her upon a bed, and in about half an hour she died. When I saw her in the ditch I did not see anything on her head. The next day I found a hair-net in the ditch where she lay. This head-dress consisted of hair and net-work, simply a curl and a net. It was after sundown in the evening, and after time to light the lamp. It was about ten minutes after the passenger-train has passed my house going east. That evening it was as bright and clear moonlight evening as there was last winter. M'r's Houston had not been to my well that evening. I saw a bucket on her arm when I saw her in the ditch where she was lying. I looked at the bucket, and it did not as if it had had water in it recently. M'r's Houston was lying lengthwise in the ditch with her head to the west.

28 Cross-examined:

My house and M'r's Houston's stand nearly opposite to each other—one on one side and one on the other. The street that crosses the track west of my house is about from fifty to ninety feet from my house. M'r Houston was formerly in the habit of getting water at my well part of the time, and part of the time out of M'r Collins' well. I think that there is but on' track opposite my house. The frog is east of my house, and between my house and the depot.

Re-examined:

My husband works for and is section foreman on the Southwestern Railroad.

Recross-examined:

There is no pathway, but in coming across you can pass over the railroad between my house and M'r Houston's. When they come after water they come across the railroad straight from the house to my door.

THOMAS COLLINS:

My name is Thomas Collins. I am forty years old. I live in Cameron, Clinton County, Missouri. On or about the 13th day of December last, 1872, I remember seeing the evening passenger-train come in from the west, the evening of her death. I am acquainted with the location of the section-house and the house that M'r Houston lived in, that have been spoken by the witnesses previously examined. In going from the house where M'r Houston lives in to the section-house south, you cross the main track and the side-track of the southwest branch of the Chicago, Rock Island and Pacific Railroad, formerly called
29 the "Southwestern Road." The section-house on the Chicago, Rock Island and Pacific Railroad stands, as I can judge, about fourteen feet from the centre of the ditch, and about eighteen feet from the centre of the main line of the said road. I never saw any plank, or anything to walk on; but a person could cross over the track between where M'r's Houston lives and the well at the section-house. I have seen M'r's Harvey's children cross over there at the west end of the section-house; can't say whether it is a public place or not. The track of the Chicago, Rock Island and Pacific Railroad *track* runs east along Second street until it comes near to Harris street; it there diverges to the south. The section-house stands about one hundred and fifty feet east of the centre of Harris street. On the evening that M'r's Houston was killed I was going down town after my mail, from the six o'clock

evening train on the Hannibal and S't Jo. Railroad, and I heard a racket, and looked and saw the train coming in on the Chicago, Rock Island and Pacific Railroad, and saw it pass freight-cars on the side-track west of the crossing on Harris street. I did not notice whether there was any cars on the side-track opposite the section-house or not. The cars stood near to the plank-crossing on Harris street, but the crossing was open. The crossing is on or near the centre of the street. The freight-cars on the side-track were on the north side of the main track. When I first saw the train coming in I was standing at my gate. The ground there is about twenty feet above the level of the railroad-track. When I first saw the train coming it was about five or six hundred feet west of Harris street. I have had a good deal of experience with rail-
30 roads; I have been traveling on them for several years. To the best of my knowledge, that train was running at the rate of twenty miles an hour. The train was inside of the town when I first noticed it. I did not notice the train after it came to the depot, or after it passed through the cut opposite my house. There was no considerable steam passing of(f) through the safety-valve when I noticed it. I have been on the road several times, and should judge that they were running as fast from the time I first saw them until they applied the air-brakes, opposite my house, as they run any place between here and Plattsburg. I should judge that they were running faster at that time than I ever saw them before or since. It is over a hundred feet from a point twenty feet west of the section-house to the crossing of Harris street. The whistle was not sounding or the bell being rung other than I have seen on many other trains, caused by the speed of the engines on a new or rough road. There was noise enough without the bell or whistle. I saw the train cross Harris street; the whistle was not sounded nor the bell being rung, except by the jostling of the train. The train passed Harris-street crossing at about the same rate of speed as it run from the time I saw it west of there. It was between day and night—just twilight—when the train came in; light enough so that I could see a man to the upper-junction depot on the Hannibal and Saint Joseph Railroad; it is about a quarter of a mile to the upper depot from where I stood when I saw the train.

Cross-examined:

31 M'r Houston's house is about one hundred and ten feet from the section-house, in a northwest direction. I think it is about sixty (60) feet west of a line due north of the section-house. The bank at a point north of the section-house is about three feet high; on a straight line from the section-house to Houston's house it would be about twenty feet west to grade. The section-house is about two and one-half feet above grade. In going from the section, on the south side of and parallel to the railroad-track, it is about forty feet west to grade. The speed of that train on the Chicago, Rock Island and Pacific Railroad through Cameron was about the same as of trains on the Hannibal and Saint Joseph Railroad anywhere between these depots on their road. It is passable in passing in a straight line from the section-house to M'r Houston's house with an empty bucket; but I would not consider it accessable for a woman with a bucket of water. It is about twenty feet west of the section-house, on the south side of the track, to where the bank would be passable, *or passable.* Persons crossing there generally go up or down the track until they come to grade.

Re-examined:

Harris street crosses Second street. It is about fifty feet from the

west side of the house where M'r Houston lives to the east side of Harris street, and the house fronts on Second street; and from M'r Houston's gate it is about one hundred feet to the crossing on Harris street. The relative position of Second street and the railroad-track opposite the house of M'r Houston is parallel, and the railroad intersects
32 Second street about the west line of Harris street. The south side of the right of way is about the south side of the section-house, and eighty feet north of that would come within about ten feet of the south side of Second street. The right of way of the Chicago, Rock Island and Pacific Railroad is not fenced between the section-house and Harris street.

WILLIAM GREENHALGH:

My name is William Greenhalgh; I am forty years old; I live in Cameron, Clinton County, Missouri. I recollect the evening on which M'r's Houston was killed. On or about the 13th day of December, A. D. 1872, I saw the evening passenger-train coming from the west that evening on the Chicago, Rock Island and Pacific Railroad into the town of Cameron. I recollect that it was on Friday evening, and the evening she was killed. When I first saw the train it was about two hundred yards west of the United States Hotel. Neither the bell was ringing nor the whistle blowing. I watched the train as far as I could see it, or until it went around the curve near grain or corn house, near the depot of the Chicago, Rock Island and Pacific Railroad. During all this time the bell did not ring or the whistle blow. When the train passed my door, about one hundred and thirty or forty feet west of the United States Hotel, it was going at the rate of thirty miles an hour, at least, according to my judgment.

Cross-examined:

After the train passed my door I could not perceive any slacking of the speed, but judge from the dancing of the train that the *breaks was* put on about opposite the pond, two hundred and fifty or three
33 hundred feet east of the United States Hotel. From the United States Hotel to the crossing on Harris street I think it is about eight hundred and fifty or nine hundred feet. I never passed over the ground but a few times, and do not pretend to give the distance accurately—just my opinion. From the west end of the pond to the crossing on Harris street, I think it is about six hundred feet.

Re-examined:

When the passenger-train passed my house that evening, above alluded to, on the Chicago, Rock Island and Pacific Railroad, it was moving at a greater rate of speed than I ever saw it run before or since. My house is about forty feet from the track of the Chicago, Rock Island and Pacific Railroad. I was standing at my door when the train passed by.

ANDREW Q. RISLEY:

My name is Andrew Q. Risley. I am forty years old. I reside in Cameron, Clinton County, and State of Missouri. I am a physician and surgeon by profession. On the evening of from December the tenth to the fourteenth of December, A. D. 1872, about six o'clock, or later, I was called to the residence of M'r Houston, the plaintiff, and found his wife dying; she died in about fifteen minutes. I made a rather superficial examination, and in so doing I passed my hand up from the lower extremities to the right hip, and observed there a bruise about four inches in length. I examined the hip and pelvis and found crepitation of the bones of the

upper third of the *fema*, and the pelvis bones and lower portion of the spinal column. I am satisfied that the injuries of M'r's Houston
34 must have been occasioned by some very great external violence or concussion. I wish, however, to say that all of the injury that I found upon the body of M'r's H. may have been produced by other means than by a locomotive. This injury may have been inflicted by falling from a great height, or being thrown violently from a wagon; it may also have been produced by a locomotive. I observed a bruise also upon the right temple. I do not think that the skin was very much broken. This may have been produced from various causes.

Cross-examined:

The injuries that I observed upon M'r's H. may have been produced in great variety of ways. The foregoing injuries may have been produced by coming in collision with any blunt substance with sufficient force.

JOHN SHOLTENHAMER:

My name is John Sholtenhamer. I am forty years old. I live in Clinton County, Missouri. On December the 13th, A. D. 1872, I was at my store on Second street, about forty feet north of the track of the Chicago, Rock Island and Pacific Railroad. I heard the passenger train coming from the west, going east, on that road, and looked and saw it. I consider that it came in at a very uncommon or fast rate of speed; I think at over thirty miles an hour when it passed my house. It shook the very foundation, and the whole ground where my store stood on. The bell was not ringing, nor the whistle *was not* blowing. I was sitting in my house, about ten or twelve feet from the window. The whole
35 front of my store is glass, except about two feet at the bottom. My store is about twelve hundred feet east from the west line of the town of Cameron, and about fourteen hundred feet west of Harris street. My store is about four hundred feet west of the United States Hotel.

MICHAEL TRAINOR:

My name is Mike Trainor; I am twenty-three years old. On the evening in December, 1872, that M'r's Houston died I was standing on the engine on the side-track of the Chicago, Rock Island and Pacific Railroad, about thirty rods west of their depot building, in Cameron, Clinton County, Missouri, and State of Missouri; this pretty well on towards seven o'clock p. m. While I was standing there the evening passenger-train going east on that road came in and passed me. The train was running at the rate of fourteen or fifteen miles per hour. The construction-train was on the side-track west of me. I did not hear any bell ringing or whistle blowing. After the engine had passed the section-house the bell rang, but I did not hear the whistle at all. I guess I stood about twenty rods east of the grain-house on that road. I am not sure.

Cross-examined:

I think from the depot to the grain-house it is about two hundred yards; I am not sure. I guess I was pretty well on to forty rods west of the depot. I saw the head-light on the passenger-train about a quarter of a mile west of where I was standing. I think the train was running at the rate of thirty-five miles per hour in the west part of town. I think the air-brakes was not put on until the train got opposite the coal-platform and east of the section-house, and I think the

36 steam was not shut off until the train got east of the coal-platform. I suppose I was about twenty rods east of the grain-house, probably further, and possibly not so far.

Re-examined:

At that time I was employed by the Chicago, Rock Island and Pacific Railroad Company. I am not in the employ of the company at this time. The passenger-train that evening was behind time. I think it was well on to seven o'clock when it came in. When I first saw the train coming in from the west that evening, I was standing on the bank south of the road.

ASHEN F. ELY:

My name is Ashen F. Ely; I am fifty-four years old. On the evening of December, 1872, on which M'r's Houston died I was standing on the porch of the Star Hotel, in Cameron, Clinton County, Missouri, about five rods, or perhaps further, northeast of the depot on the Chicago, Rock Island and Pacific Railroad. I saw the evening train on the Chicago, Rock Island and Pacific Railroad come in that evening. I heard no ringing of the bell or sounding of the whistle; nothing but the rumbling of the train. I first saw the train about one hundred and fifty yards west of the depot, and from there until it stopped. When I first saw the train it was running at the rate of speed of about twenty-three miles per hour. The engine ran past the depot east about ninety feet. The engineer reversed steam and ran back west about seventy-eight feet. I have seen the engine run past the depot since then.

37 EDWARD J. SPRAGUE:

My name is Edward J. Sprague. I am twenty-four years old. On the evening of December 13th, A. D. 1872, I was between the Chicago, Rock Island and Pacific Railroad track and the Hannibal and Saint Joseph Railroad track, near the junction depot of the latter road, in Cameron, Clinton County, State of Missouri. As near as I can judge, it was about forty-five minutes past six o'clock. While I was there, the evening passenger-train on the Chicago, Rock Island and Pacific road passed me going east. I should judge the rate of speed of that train was between twenty-five and thirty miles per hour. I heard no bell ringing or whistle blow; it might have been blown, however, though I did not hear it. I am employed by the Hannibal and Saint Joseph Railroad Company as check and baggage master, at the junction depot, in Cameron, M'o'. I am accustomed to observing several trains on both roads every day.

Cross-examined:

At the time the train passed me I was about nine or ten rods from the track of the Chicago, Rock Island and Pacific Railroad, and I was nearly a quarter of a mile from the depot of that road.

JACOB DWIRE:

My name is Jacob Dwire. I live in Cameron, Clinton County, Missouri. I am forty-two years old. On the evening of December the 13th, A. D. 1872, the evening M'r's Houston was killed, I was at my house about eighty-five feet north of the track of the Chicago, Rock Island and Pacific Railroad, and about fifty feet north from the section-house on the Chicago, Rock Island and Pacific Railroad in
38 Cameron, M'o'. I heard the evening passenger-train going east pass my house that evening. I suppose it was that train. In

about three to five minutes, a couple of little girls, the plaintiff's daughters, came over and told me to come over and help carry their mother into the house. I immediately ran down to the track of the Chicago, Rock Island and Pacific Railroad, opposite M'r Houston's house, and found M'r's Houston, the wife of the plaintiff—she was in a helpless condition—she was lying prostrate upon the ground on the north side of the track, and, with others, took her and removed her from there to her house, and put her on the floor upon a bed, and in about thirty minutes she died. There was a path or crossing opposite the section-house, and some ties or plank across the ditches, at the time of M'r's Houston's death, on the north side of the track; the ties across the ditch was opposite M'r's Houston's house, and on the south side of the track the ties or the plank was opposite or near the section-house. People frequently crossed there about that time. I have frequently crossed there myself.

Cross-examined:

I frequently feel the jar of the train as it passes my house—it jars the ground considerable. In going from M'r Houston's house to the well of the section-house, a person would have to travel along the track about sixty-five feet.

Further to maintain the issues on his part, plaintiff introduced himself as a witness, and testified as follows:

I was not at home when my wife was injured. I was at work near Gallatin, Missouri. I had lived in Cameron about six weeks. I
39 lived on the north side of Second street. My house stood back from the street about ten feet. The railroad ran parallel with Second street, in front of my house. Harris street was from 30 to 40 feet west. Where Harris street crossed the railroad there were two tracks, the main and the side track; they were seven or eight feet apart.

Further to maintain the issues on his part, plaintiff introduced JOHN DONOVAN, who testified as follows:

At the time of the accident to M'r's Houston I lived on Second street, 300 or 400 feet west of M'r Houston's residence. I was in my house when the train that caused the injury passed my house that night. It was running pretty fast—20 or 30 miles an hour. I went out of my house after the train passed; heard a noise down at Houston', and went down and helped carry in M'r's Houston. I lived near the track. Signals might have been given by the train. I did not hear any. It is 300 or 400 feet from my house to where we found M'r's Houston. There was a curve to the south near my house. There were freight-cars on the side-track opposite my house, extending down to Harris street. They did not extend beyond Harris street. The crossing was open. I do not think there were any cars east of Harris street. The cars would obstruct the view from the north side of the track. They were carrying Mrs. Houston in when I went down there. The spot where she was found after the injury was 85 feet east of Harris street and ten feet west of the section-house. I have seen it measured.

Cross-examined:

40 I could see the train 600 feet east from my house that night; it was a bright evening; could see it three-fourths of a mile west from the section-house, or from Mr. Houston's house. The main track was on the south side; the side-track was north of the main track. The freight-cars stood on the switch on the north track; think they had

been there all day. The train made a good deal of noise that night. I heard it plainly. I was in my house when it passed. The doors and windows were shut. My house is fifty feet from the track. I had no trouble to hear the train. I think I could have heard it a half a mile. The night was still. There was always more or less switching about that time of day at the depot of the Hannibal and St. Joe Railroad. Two passenger-trains came in from the west on the Hannibal Road about that time. There was generally switching at the junction on the Hannibal Road about that time in the evening. I did not hear any that night. The junction-depot on the Hannibal road is 700 or 800 feet west of Harris street. The Chicago, Rock Island and Pacific Railroad runs on Second street from city limits on the west side of town to a point east of my house. It leaves Second street about forty feet west of Harris Street.

EDWARD WHEELER, being introduced on the part of the plaintiff, testified as follows:

At the time of M'r's Houston's death I lived in Cameron, two blocks and two streets west of Harris street, just north of the railroad
41 track. I saw the train come in that evening. It was running very fast—so fast that I noticed the fact. There were freight-cars standing on the side track, reaching to Harris street. There were cars east of Harris street; do not know whether the crossing was open or not. I did not hear any whistle or bell. The train passed me at the rate of 20 or 30 miles an hour. I could not see the depot from where I stood in front of my house when the train passed; but I could see the section and grain houses. When I first heard the train coming I thought it was the train switching at the junction depot on the Hannibal Road. I saw M'r's Houston fifteen or twenty minutes after the train passed. There was some snow on the ground. The section-house was not fenced. The track was all open. Harris street is a public street. The construction-train came on to the side track east of Harris street a little while before the passenger-train came in. I knew it was train-time. I may have heard the train 50 or 80 rods distant before I saw it. I was standing on the sidewalk; saw the passenger-train come through the cut and pass the grain-house, and until it ran 700 or 800 feet east. There was no obstruction in my way. The train made a good deal of noise that night, and I think I could have heard it to the depot. There was considerable settlement on Second street west of the depot. There were seven houses going west from depot to my house.

O. W. BRUNER, introduced on the part of the plaintiff, testified as follows:

42 On the evening that M'r's Houston was injured I stood in front of my restaurant, at the west end of the switch on the Rock Island Road, and near the junction depot on the Hannibal Road, when the train that caused the injury came in. I think the train was running twenty-five miles an hour when it passed my place. I heard no bell or whistle. My restaurant fronts the Chicago, Rock Island and Pacific track on Second street.

Cross-examined:

I could see the train one-quarter of a mile west and seventy-five rods east. I heard the train forty rods west, and could hear it as far as I watched it east, which was about one hundred yards. When the train had passed about one hundred yards I went into my restaurant, and

paid no further attention to it. Four passenger-trains were due in Cameron near the same time.

PHILIP QUIGLEY, introduced on the part of the plaintiff, testified as follows:

I was in the employ of the Hannibal and S't Joe Railroad Company at the time of the death of M'r's Houston. I was employed in the coal shed at the Hannibal depot. The train on the Rock Island Road came in that evening between six and seven o'clock; two trains on the Hannibal Road were due about the same time. I was at my house, 1,200 feet west of Houston's, when the train on the Rock Island Road passed me, running at a rate of about twenty-five miles an hour. I heard no bell or whistle. From Houston's one could see the train a half a mile
43 west. I heard the train coming in. I could hear it a quarter of a mile—the night was still.

M'R'S HOLLINS, introduced on the part of the plaintiff, testified as lows:

On the night of the accident I was at my eating-house north of the Rock Island depot. I was in front of my house when the train came in. It ran very fast; ran by the depot and then backed back to it. I heard no bell or whistle. The train was about ten minutes late. It had been running on that time about a half a year; it was due at 6.30 p. m., and was about ten minutes late that evening.

The plaintiff here rested his case, and the defendant read in evidence the depositions of Tho's N. Carhart, William Connant, Newton J. Emery, David A. Clark, Chauncy E. Nicholson, and James E. Conklin, which said depositions are in words and figures as follows, to wit:

THOMAS N. CARHART:

My name is Thomas N. Carhart; age, thirty-two years; residence, Trenton, Missouri, and my occupation that of locomotive-engineer. I have been engaged as a locomotive-engineer about seven years. I was in the employ, as locomotive-engineer, of the Chicago, Rock Island and Pacific Railroad on the 13th day of December, A. D. 1872, and had been for more than a year, between Trenton and Leavenworth. I recollect the circumstance of the injury of M'r's Hamilton Houston, at the town of Cameron, Missouri. At the time of the injury, which occurred
44 on the evening of the 13th of December, 1872, I was engaged as locomotive-engineer on the express-train, No. 6, going east. William Connant was the fireman on my engine at the time. I occupied the right-hand side of the engine, and M'r William Connant was on the left side of the engine, the fireman's position, as we came into the town of Cameron at the time of the injury. The injury occurred about 90 feet east of the crossing of Harris street. I saw M'r's Houston almost at the same instant I struck her. She was on the outside of the rail, on the right-hand of the track, and on the south side of the road. The time elapsing between the time I saw M'r's Houston and the time the engine struck her may have been five seconds. When I first saw her she appeared as coming from the track; it appeared as an object just coming into view when the engine struck her. She was struck with the most extreme point of the bumper of the engine. The bumper is a large stick of timber or beam across the front of the engine. She was struck with the end of the beam on the right-hand side; she was knocked into the ditch on the right-hand side. She fell into the ditch about ten feet from the

northwest corner of the section-house. I don't know that there was any foot-path on the south side of the track. The engine was about four feet from M'r's Houston when I first saw her. The injury occurred about one thousand feet east of the west frog of the west switch. My train was on time that evening. I think the time for reaching Cameron
45 was half past six o'clock p. m. I think the evening express had been running on that time about six months. At the time the injury occurred we were running about eight or nine miles an hour as, we approached town. At the time we crossed Harris street we were running at a speed of about eight miles; the speed was about the same when the injury occurred. In approaching the station of Cameron that evening, I gave the station-whistle about two thousand feet from the station, and the engine-bell commenced ringing about 1,500 feet before we arrived at the place the injury occurred and continued ringing up to the accident. The train stopped that evening at the usual place at the station. As soon as the train stopped, I run back and notified the conductor of the accident, who had just stepped off the platform of the car, and we ran back to the place of the accident. M'r David A. Clark was the conductor of the train. We found M'r's Houston lying between the two rails of the side track. The side track at this point is on the north side of the main track. When we arrived two ladies were present with M'r's Houston. M'r Clark, myself, and Curwin picked her up and carried her about twenty feet on the north side of the track, and laid her down as she requested. About the time we were carrying her away other parties came. I did not know at the time the engine struck her what object it was the engine struck. I did not know what had been struck by the engine until the conductor and I had gone back where the accident had occurred. It was twilight when the accident occurred. The moon was shining a trifle, and the head-light was burning at the time. I cannot tell any better how dark it was than to say
46 that it was twilight. There were two or three freight-cars standing on the side track about 30 feet west of the crossing of Harris street at the time of the accident. I have looked over and examined the ground where the accident occurred since it occurred. A train can be seen about four thousand feet west of the place of the accident. Standing on the main track, at the place where the accident occurred, a train can be seen west of it about 4,000 feet. I know the house where Houston was said to have lived at the time of the accident. The house and the street on front is higher than the railroad track at a point south of the house. The accident occurred at a point where there is a side cut of two or three feet on the north side and no cut on the other side. I don't think that the cars on the side track that evening would have obstructed the view at any point between M'r Houston's house and the place where the injury occurred. When I saw the object on the track I slacked the speed of the engine.

Cross-examined:

The head-light of the engine was burning at the time the accident occurred. The head-light of the engine on that evening cast or throwed its light ahead of the engine, on the track, about the distance of three telegraph-poles. In speaking of the telegraph-poles I mean the distance between them as they stand along the track. I should judge the poles stood about one hundred feet apart. I think I could see along the track about 300 feet ahead of the engine. I think I could see about that distance ahead of the engine on the track the evening the accident occurred.

47 WILLIAM CONNANT:

My name is William Connant; aged twenty-four years. My residence is Trenton, Missouri, and my occupation is that of engine-dispatcher at the company's yard in Trenton, Mo. About the 13th of December, A. D. 1872, *on* was firing on engine No. 53 for the Chicago, Rock Island and Pacific Railroad. Thomas Carhart was the engineer on said engine No. 53. I remember the circumstance of the injury to M'r's Houston. It was on the 13th of December, A. D. 1872. I was on the left-hand side of the engine as the train was approaching the city limits of Cameron, and discharging the duties of fireman, and was my position. M'r Thomas Carhart was on the right side of the engine, in the discharge of his duties as engineer, at the time the accident occurred. I did not see any obstruction that evening within the city limits on the track. I did not hear the blow nor see M'r's Houston, but heard of the accident afterwards. At the time the train struck the city limits we were going at the rate of eleven or twelve miles per hour, but the speed was soon reduced, and when passing from Harris street to the section-house, I should think the speed was seven or eight miles per hour. The whistle was sounded at our approach to the city limits that evening. I rung the bell. I commenced about 1,500 feet west from the depot. The train stopped at the usual place at the station, and it did not pass the depot and then back down. It is about 90 feet from the section-house to the depot. I could not say what distance it is from the grain-house to the section-house. I was at my position, ringing the bell from the time the train approached the city limits until it stopped at
48 the station the evening of the accident. There was a coal-shed close to the section-house, on the east side of it.

NEWTON J. EMERY:

My name is Newton J. Emery; age, twenty-two years; my residence is Liberty, Missouri, and my occupation is that of telegraph-operator. My occupation on the 13th of December, A. D. 1872, was that of assistant agent at Cameron, Mo., in the employ of the Chicago, Rock Island and Pacific Railroad. I remember of hearing of the circumstances of the injury of M'r's Houston on the evening the injury occurred. I saw her that evening about the time of her death. When the train pulled up to the station that evening I was standing in the passenger-room door of the station-house. The train was on time that evening. I think the time of arrival was 6.30 p. m. I cannot tell how long the train had been running on that time. From the position I occupied I could see the train about 200 feet on her arrival. When I was first advised that the train was coming it was within 75 feet of the depot. The train was running slow. I could not say what speed it was running at the time. The train stopped right in front of the depot that evening at the usual place. The train did not run by the depot. It stopped at the depot.

DAVID A. CLARK:

My name is David A. Clark; aged forty-eight years; my residence is Leavenworth, Kansas, and my occupation is that of a railroad conductor, and in the employ of the Chicago, Rock Island and Pacific Company. I was engaged as conductor on the passenger-train of
49 said company on the evening of the 13th of December, A. D. 1872, and running the train. I remember the circumstances of the injury to M'r's Houston. I cannot remember exactly the day of the month when it happened. I was conductor of the train that came into Cameron the evening she was killed from the west. The train came into

Cameron that evening on time. I was at the front end of the forward coach at, or soon after, the approach of the train to the city limits, and I remained there till the train arrived at the station in the city. I heard the engineer give the station-whistle at the approach of town, and after that I heard the bell ring till we arrived at the station. I think the train was running at the rate of 20 miles per hour when we approached the city limits. The speed was then gradually reduced as we approached the depot, and by the time it passed the Harris-street crossing we were reduced in speed to about 7 or 8 miles per hour. The train stopped in front of the depot, and did not run by at all that evening. I did not see or have any knowledge of any obstruction on the track within the limits of the city that evening until we got to the station. M'r Carhart gave me the first information of any obstruction on the track. He thought he had struck something; thought it was a man. Carhart and myself immediately went back and found M'r's Houston a few feet west of the section-house and within the rails on the side track. There were no freight cars east of the Harris-street crossing. Do not know where the construction train was that evening. It was further east, I think, on the side track. I have been railroading about seventeen years.

50 It is some 50 or 60 feet east from Harris-street crossing where we found M'r's Houston after she was hurt. She had been moved before M'r Carhart and I got to where she was. It is some 600 feet from the section-house to the depot. The time for the arrival of the train at Cameron, Mo., was 6.30 p. m. I had been running that train about a year and three months prior to the accident to M'r's Houston. I think the train had been running on that time about six months. It was considerable dark—quite dark. I think the moon was just rising and daylight gone when we arrived at Cameron. I think the head-light was lit up. It was lit up two or three stations back. There was a coal-house close to the section-house, and close to the track. It was a platform boarded up two or three feet high above the platform on three sides.

Cross-examined:

The coal-house stands about 20 feet east of the section-house. We found M'r's Houston quite a distance west of the grain-house. We had what we call the air-brake on the train; the patent is the Westerhouse air-brake. When a train is running at the rate of seven or eight miles per hour, it could be stopped with the Westrohouse brake at the distance of the length of the train of three or four cars.

CHAUNCEY E. NICHOLSON:

My name is Chauncey E. Nicholson; aged twenty-four years; my residence is Leavenworth, Kansas, and by occupation a baggage-

51 master, and now in the employ of the Chicago, Rock Island and Pacific Railroad. I remember the circumstances of the injury of M'r's Houston, on the evening of the 13th of December, A. D. 1872. I was standing at the door of the baggage-car when the train came in through the town of Cameron. The train was running at the rate of 18 or 20 miles an hour before approaching the city limits. After the train got into the city the speed was slackened gradually, so that when the train crossed Harris street it was running at the rate of 7 or 8 miles per hour. With respect to the depot, the train stopped at the usual place at the station, the baggage-car fronting the baggage-platform. The train did not run by the station and then back down. The usual whistle by the engineer was given at the approach of the city limits. After whistling, the bell was rung and continued to ring down to the station.

JAMES E. CONKLIN:

My name is James E. Conklin; my age is twenty-three; my residence is Cameron, Missouri; and my occupation, station-agent for the Chicago, Rock Island and Pacific Railroad Company. I remember the circumstance of the death of M'r's Houston. I remember the arrival of the express passenger-train from the West on the evening of the 13th day of December, A. D. 1872, and I remember that the train was on time. I was on the platform of the depot when the train pulled in. I first saw the train that evening as it was approaching the station. The train stopped at the usual stopping-place. It did not overshoot and then back down. I think train-time was 6.30 p. m. for the express from the West.
52 I don't remember definitely that that was the time; it is my impression that was the time. I have no time-table along with me. It was after dark when the train arrived. I had my lamps lighted in the office when the train arrived. I don't remember whether there was a head-light on the engine or not. I had been at that station only four weeks, and that train had been running on that time all that time.

S. H. WOODSON, introduced by the defendant, testified as follows:

I was on the train when M'r's Houston was injured. When the train crossed the Hannibal Road I went out on the platform of the car next to the baggage-car, and remained there until the train reached the depot, when I stepped off on the north side and went to the Combs House. The train was running six or eight miles an hour when it passed Harris street. I do not remember whether I heard the bell or whistle after the train entered the city limits. I have been at the spot where M'r's Houston was found. One can see along the track half a mile west from that point, and nearly a mile west from M'r Houston's house. The train whistled at the Hannibal and S't Joe crossing; do not remember to have heard it whistle afterwards.

Cross-examined:

I am an attorney for defendant. Think it took eight or ten minutes to run from the crossing to the depot, but cannot tell just
53 how long. I think it is about three-quarters of a mile from where the train crossed the Hannibal & S't Joseph Railroad to the Rock Island and Pacific depot, where I got off the train.

CHESTER D. COMBS, produced by the defendant, testified as follows:

I lived at and kept the Combs House, at Cameron, at the time M'r's Houston was injured. My house was the regular eating-house at Cameron, on the Rock Island Road. I remained in the office, as I usually did, until I heard the train approaching, then went to the dining-room and gave some orders, and then went down to my gate opposite the Rock Island depot. When I got to the gate the train was coming from the west, and was then about 300 yards distant from the depot. The train came up about at its usual rate of speed, and stopped at the depot. It did not run past and then back down. I do not remember whether the train was on time that evening. I was not in the employ of the company. I had the consent of the company to keep the eating-house for accommodation of travel, &c. M'r's Hollis, who just testified, was nearer the train than I was.

THOMAS PECKHAM, introduced by the defendant, testified as follows:

At the time M'r's Houston was killed I lived in the western limits of

Cameron. When the Rock Island train came in hearing that evening,
I was walking on Harris street. I heard the whistle sounded
54 and looked west, and saw the train coming about a half a mile
distant. I walked from Harris street on to Second street, and when I got near the grain-house the train passed me. I heard the whistle after the train crossed the Hannibal & S't Jo. Road. I heard a locomotive-bell ringing while the train was coming up, but did not know whether it was the bell on Rock Island train or trains from the west on the Hannibal & S't Jo. Road, which were due about the same time.

WILLIAM MCCOLLUM, introduced on the part of the defendant, testified as follows:

I am road-master in the employ of defendant. I was on the train when M'r's Houston was killed. The train came into Cameron on time. The whistle was sounded 20 or 30 rods west of the city limits. The train was running about fifteen miles an hour; at Harris street crossing about eight miles an hour. I have examined the ground since, and prepared the diagram now shown and examined by the court, counsel, and jury, which diagram is in words and figures as follows, to wit: (Said diagram is attached hereto, it being impracticable to make the same on this record.)

Standing on defendant's railroad at the place where M'r's Houston was found, one can see a train coming from the west for near a half a mile. I was at plaintiff's house the night of the injury, and after M'r's Houston's death, and after M'r Houston had arrived at home. A physician present was advising plaintiff to bring suit against the company
for the injury, when plaintiff replied that he attached no blame
55 to any one. The train in proof stopped at the depot at Cameron,
and did not overshoot and then back down. I went home when the train stopped, and afterwards heard of the accident. From the depot west to city limits of Cameron is near a half a mile, and from city limits to the crossing of the Hannibal and S't Joseph Railroad is about a half a mile further west.

LEWIS A. BALL, introduced on the part of the defendant, testified as follows:

At the time M'r's Houston was killed I was, and still am, traveling agent for settling claims, in the employ of defendant. Was on the train at the time of the injury to M'r's Houston. About the western limits of the city the whistle was sounded. I remember it as the prolonged and rather peculiar whistle usually given by M'r Carhart. My impression is that the bell was rung through the city, but am not certain. When the train crossed Harris street it was running quite slow—think I could have stepped off in safety—the speed was about five miles an hour. I stood up in the forward end of the car next to the baggage-car, while the train ran through the city and up to the depot. The circumstances of the signals, rate of speed, &c., was the subject of discussion in the baggage-car, after we had heard of the injury—some claiming that the signals were given, and others that they were not given.

ROBERT O. CARSCADDIN, introduced on the part of the defendant, testified as follows:

I am master-mechanic at defendant's shops at Trenton, Missouri.
56 Have known plaintiff about three years. Had a talk with plaint-

iff about the death of his wife, at the shop-door in Trenton, about a week after the accident. M'r Carhart had expressed to me his sorrow for the accident, and a wish to know whether M'r Houston blamed him in any way for the death of his wife. I approached plaintiff, and, after expressing my own sorrow in his afflictions, I expressed the feelings and wish of M'r Carhart, when M'r Houston replied that it was bad, but that he did not blame any one. M'r Carhart was never discharged for drunkenness, or at all; he was away for a time, but never discharged.

Defendant here rested its case.

The plaintiff, further to maintain the issues on his part, recalled himself as a witness, and testified as follows:

I was in the employ of the company at the time of the death of my wife. Some time before the injury I asked M'r Havey, who lived in the section-house at Cameron, for permission for my family to get water at the section-house well, which he gave me. I do not now remember what I said to either M'r McCallam or M'r Carscadden in regard to blame for the death of my wife. At the time McCallum referred to, I was in a distracted state of mind, and I do not remember what I said—did not know who was to blame.

Here plaintiff again rested his case, and there was no other or further testimony offered or adduced in the case.

57 Before the cause was submitted to the jury, the court, on motion of the plaintiff's counsel, gave to the jury the following charge, to wit:

It was the duty of defendant's servants and employees managing and operating the locomotive and train of cars which inflicted the injury complained of to ring the locomotive-bell at least eighty rods from the place where the railroad crosses any traveled public street, and to keep the same ringing until it shall have crossed such street, and any failure to ring such bell is negligence, and if this negligence caused the injury sued for, the defendant is liable, if the plaintiff's wife used reasonable and proper care to avoid such injury.

The wife of plaintiff has the legal right, in crossing the track of defendant upon a public crossing, to rely upon a substantial compliance on the part of defendant's servants operating its railway-trains, with the duties required of them by law in the matter of giving signals and warnings of approach to a street-crossing; and if plaintiff's wife, in crossing the railroad-track of defendant, on any traveled public street or road, was killed by the railway-cars while being run to and over a public street-crossing, without giving the required and usual signals of approach, and in consequence of such negligence of the company, and to which killing the deceased did not directly and immediately contribute by her own negligence, then the jury will find for the plaintiff.

It was the duty of the railroad company, in running its cars through towns and villages, to slacken the speed thereof to a moderate and prudent rate; and the deceased, in the absence of circumstances

58 to put her upon her guard, had a right to presume that the train in question would be so managed, and that the proper signals would be given; and unless the jury believes from the evidence that the employees of defendant conformed to these requirements in this case, then they were guilty of negligence, and if this negligence caused the

injury sued for, the defendant is liable, if the plaintiff's wife used reasonable and proper care to avoid the injury.

Negligence of the deceased, if it existed, is a matter of defence, and it devolves upon the defendant to establish it, if it does not appear upon the evidence produced by the plaintiff.

To the giving of each of said charges defendant's counsel objected; which objections were overruled by the court; to which ruling the defendant, by its counsel, at the time excepted.

The defendant, by its counsel, then prayed the court to give to the jury the following charges, to wit:

1. Under the evidence in this cause the jury must find for the defendant.

2. Before the jury can find for the plaintiff, they must believe from the evidence that the defendants, by their agents and employees, caused the death of M'r's Houston by their carelessness and negligence in running and managing the locomotive and cars of defendant, and that there was no negligence on her part contributing in any degree to her death; and the fact that she was killed by the locomotive or cars of de-
59 fendant is no evidence of negligence or want of care on the part of defendants, their agents or employees.

3. If the jury believe from the evidence that the death of M'r's Houston was the result of any degree of negligence on her part, or that her death resulted from the negligence of herself and defendants, they will find for defendants.

4. If the jury believe from the evidence that M'r's Houston was, at the time she was injured by the locomotive in proof, on the track or right-of-way of defendants, then she was guilty of negligence, and they will find for defendants.

5. A railroad company has the right to the exclusive use of its track and right-of-way, except at a public highway or street-crossing. "A railroad-track is not built to be walked upon by the public, and the fact that persons do walk upon it, however frequently, and however commonly, does not change that proposition of law." If M'r's Houston was on the track of defendants where there was no street-crossing, she was where she had no right to be; and being in a place where she had no right to be, she was bound to use every reasonable precaution, diligence, and care against the possibility of any damage which might happen to her there. This was her imperative duty, and it was especially her duty to be vigilant and watchful to discover the approach of any train; and if the jury believe from the evidence that she was not vigilant and watchful to discover the approach of the train in proof, [and that by the exercise of vigilance and care she could have so discovered the train in question, run and managed as it was, and thereby avoided the
60 accident,] they will find for defendants, although they may also believe from the evidence that defendants' employees did not sound the whistle of the locomotive in proof, or that they did not ring the bell, or were otherwise negligent.

6. It is the imperative duty of a person who comes on a railroad-track to stop, look, and listen immediately before crossing, to ascertain if a train is approaching, and a failure to do this is negligence. This duty is important, not so much to railroad companies as to the traveling public. Collisions from want of care in this respect have often resulted in the loss of hundreds of valuable lives of passengers on trains and they will continue to happen if persons crossing railroads are not taught this simple duty, not to themselves only, but to others. This duty to look

and listen for approaching trains is even more obligatory to persons who walk along the track than it is to those who cross the track; and if the jury believe from the evidence that M'r's Houston did not stop, look, and listen for the train in proof, before she went on the track of defendants, or that after she went on said track she did not look for said train, or that she saw or heard it, or could have seen or heard it, by looking or listening, in time to have avoided injury, they will find for defendants, although they may believe from the evidence that defendants or their employees were also careless or negligent.

7. It is not enough to entitle*d* the plaintiff to a verdict in this case that the jury should believe that the defendants' employees neither rang the bell nor sounded the whistle, or were otherwise careless or
61 negligent. But if the jury believe from the evidence that M'r's Houston had notice in any other way of the approach of the train, or could have known it by the exercise of strict care and watchfulness on her part; or if she knew or ought to have known that it was train-time; or if she saw the train, or could have seen it by looking; or if she heard it, or could have heard it by listening, in time to avoid the injury, and went and walked upon defendants' track without first ascertaining that she could go or walk on said track in safety to herself, they will find for defendants.

8. The duty enjoined by law upon railroad companies to ring the bell and sound the whistle is only for the benefit of persons traveling along the public highway, and not for the benefit of persons walking along the railroad-track, and if the jury believe from the evidence that M'r's Houston was injured at a point on defendants' road which was not a street-crossing, plaintiff cannot have a right to recover in this case based on a failure of defendants to sound the bell or whistle on their locomotive.

9. If the jury believe from the evidence that M'r's Houston was guilty of any negligence which contributed to her injury, in such a manner that if she had not been negligent she would not have been injured, they must find for defendants, even though they may find that defendants' employees were guilty of negligence in the management of the train which caused the injury.

10. If the jury believe from the evidence that the train in proof was running at a very rapid rate of speed, and that by the exercise of strict care and caution M'r's Houston could have observed that fact,
62 was of itself an additional reason for keeping off the track, and out of the way of the rapidly-approaching train. No prudent person would have attempted to cross or walk along the track under such circumstances, and the inference of negligence from said facts, if true, is so clear and unavoidable that the jury must find for defendants.

Of which charges the court refused to give the first, second, third, fourth, sixth, seventh, eighth, and tenth, and gave only the charge number nine; and the court changed and modified charge No. 5 by inserting the words in brackets, and then gave said charge in its modified form.

To the refusal of the court to give the charges Nos. 1, 2, 3, 4, 6, 7, 8, and 10, and to the action of the court in modifying charge No. 5, as above shown, the defendant, by its counsel, at the time excepted.

The court, on its own motion, charged the jury as follows:

GENTLEMEN OF THE JURY: Certain facts are not in dispute, and these I will first refer to.

The plaintiff's wife was killed by having been struck by a train of the defendant, in the town of Cameron, on the evening of December 13th, 1872, between six and seven o'clock.

The plaintiff and his wife had lived in Cameron some time, and at the date of the accident in question the plaintiff was an employé of the company, and his house was situate a few feet north of Second street, (near which the track of the defendant's road runs lengthwise,) and a few feet east from Harris street, which crosses Second street and
63 the company's tracks. The company had, on the south side of its track, and a little east of the plaintiff's house, a section-house, near which there was a well.

On the evening in question, the plaintiff's wife started with a bucket to go to the well on the other side of the company's tracks, and in going on or over the main track she received the injury *from* which resulted in her death. Whether she was within the track or just outside of it when she was struck and injured is a question of fact for you to determine, from all the circumstances in evidence. And there is a controversy upon the evidence whether she crossed or attempted to cross *to cross* the track at the Harris-street crossing, or at a place not a crossing, and that is a question of fact for you upon the evidence.

It seems that the head-light of the engine was burning at the time, and that it was the advancing engine that did the injury. The track being nearly straight for a half-mile or more to the west, and the ground not being rough, the light could have been seen for some distance to the west, if the view was not obstructed by cars on the side-track in the vicinity of the injury or otherwise. Whether the view of the deceased was thus obstructed is for the jury to determine from the evidence.

You have two principal inquiries to make upon the evidence:

The first one is, whether the death of the plaintiff's wife was cause' by the negligence of the defendant, or its employees in charge of its train. The railroad company had the legal right to run its trains on its
64 track, and it is not the insurer of the lives and limbs of the public. It is only bound to exercise due and proper care to prevent injuries to the public, by the use and operation of its trains, but it is bound to use proper precautions to prevent such injuries.

It is charged by the plaintiff that the death of his wife was caused by the negligence of the defendant, and this negligence is claimed to consist in the following particulars, to wit: That the train was running at the time and place in question at an unusual and dangerous rate of speed, and that it failed to sound the required and usual whistle, or to ring the required and usual bell.

(Here the court adverted to the conflicting evidence on these points, and added:)

It is the duty of the company to comply with the statute as to warnings and signals. (Here the court read the statute, 1 Wagner Mo. Stats., p. 310, sec. 38, and explained its requirements to the jury.)

It is also the duty of the company not to run at an excessive, or dangerous, or unusual rate of speed in towns or places with compact population. Now, the mere fact that the company does not comply with its duty in respect to rate of speed or signals does not necessarily make it liable for an injury, but it is liable if such omission was the cause of the injury, provided the person injured was, under all the circumstances, using reasonable care to avoid the injury.

If the injury was not caused by the negligence of the defendant in the respects imputed to it by the plaintiff, of course you will find for the
65 defendant. But in actions of this character, in order to create a liability on the part of the defendant, there must not only be negligence on the part of the company, which negligence caused the

injury, but there must be proper and reasonable care on the part of the injured person to avoid the injury.

The burden of proof is on the plaintiff to show that the company was negligent, and that such negligence caused the injury sued for.

If the plaintiff makes out a case of this kind upon the evidence produced by him, and if the defendant relies to defeat the action upon the proposition that the person injured was also negligent in a degree which materially contributed to the injury, and thus defeat a recovery, the burden of proof to establish such negligence is upon the defendant. So it has been decided by the Supreme Court of the United States.

If the plaintiff's wife was injured and killed when upon or when crossing the track of the company at a place other than a public crossing or traveled public road or street, she was bound at her peril to use all proper and reasonable care to avoid injury, and the care which she was bound to exercise would depend upon the danger which, as a reasonable being, bound to exercise a reasonable degree of care and prudence, she ought to have foreseen; that is, such a degree of care as persons generally in such circumstances would use; and if she did not, the plaintiff cannot recover, though the company was also negligent.

If by the exercise of such a degree of care she might have seen or heard the train—this train—run as it was on the particular occasion
66 and thus avoided the injury, the plaintiff cannot recover. Nor can he recover if his wife did see or hear the train, and formed the erroneous judgment that she could cross the track in safety.

But if you find that the train was running at an unusual degree of speed, that it gave no signals, and that if it had been run at a moderate and usual rate of speed, and had given the usual warnings, the injury would not have happened, the defendant is liable, unless you also believe upon the evidence that the plaintiff's wife under all the circumstances did not use that degree of care to discover the train or avoid the injury which persons ordinarily, under just such circumstances, would have used, in which event the defendant is not liable.

The established rule of the case is that one who negligently exposes himself to a negligent injury, and thus contributes to bring it upon himself, cannot recover; and whether the plaintiff's did thus expose herself you must decide upon the evidence, guided by the instructions I have just given you.

JOHN F. DILLON, *Judge.*

To the following part of said charge of the court, defendant, by its counsel, objected, which objection was overruled by the court, and to which ruling the defendant's counsel, at the time, excepted, viz: "And there is a controversy upon the evidence whether she crossed, or attempted to cross, the track at the Harris-street crossing, or at a place not a crossing, and that is a question of fact for you upon the evidence."

67 To the following part of said charge defendant's counsel also objected, which objection was overruled by the court, to which ruling the defendant's counsel at the time excepted, viz: "The track being nearly straight for a half a mile or more to the west, and the ground not being rough, the head-light could have been seen for some distance to the west, if the view was not obstructed by cars on the side-track in the vicinity of the injury, or otherwise; whether the view of the deceased was thus obstructed is for the jury to determine from the evidence."

Defendant's counsel also objected to the following part of said charge,

which objection was overruled by the court, and to which ruling of the court defendant's counsel at the time excepted, viz: "If the plaintiff makes out a case of this kind upon the evidence produced by him, and if the defendant relies to defeat the action upon the proposition that the person injured was also negligent in a degree which materially contributed to the injury, and thus defeat a recovery, the burden of proof to establish such negligence is upon the defendant. So it has been decided by the Supreme Court of the United States."

Defendant's counsel also objected to the following part of said charge, which objection was overruled by the court, to which ruling of the court the defendant's counsel at the time excepted, viz: "If the plaintiff's wife was injured and killed when upon or crossing the track of the company at a place other than a public road or street-crossing, she was bound at her peril to use all proper and reasonable care to avoid injury; and the care which she was bound to exercise would depend upon the danger which, as a reasonable being, bound to exercise a reasonable degree of care and prudence, she ought to have foreseen; that is,
68 such a degree of care as persons generally in such circumstances would use; and if she did not, the plaintiff cannot recover, though the company was also negligent."

Defendants also objected to the following parts of said charge, which objection was overruled by the court, to which ruling of the court the defendant's counsel at the time excepted, viz: "But if you find that the train was running at an unusual degree of speed, that it gave no signals, and that if it had been run at a moderate rate of speed and had given the usual warning the injury would not have happened, the defendant is liable, unless you also believe upon the evidence that the plaintiff's wife, under all the circumstances, did not use that degree of care to discover the train or avoid the injury which persons ordinarily, under just such circumstances, would have used, in which event the defendant is not liable."

The court further instructed the jury to the effect that, under the statute of Missouri, if the jury should find for the plaintiff, they should find for him in the sum of five thousand dollars, to which ruling of the court the defendant's counsel objected, which objections was overruled by the court, and to which ruling of the court the defendant's counsel at the time excepted.

The jury returned into court their verdict for the plaintiff for the sum of five thousand dollars.

Be it also remembered, that at the same term of the court, and on the sixth day of the term, it being the 21st day of November, 1874, the defendant filed here in court its motion to set aside the verdict and judgment, and for a new trial, which motion is as follows, to wit:

69 In the circuit court of the United States for the western district of Missouri.

HAMILTON HOUSTON
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Come now said defendants and move the court to set aside the verdict and the judgment and grant them a new trial in said cause, for the reasons—

1. That the verdict is against the evidence.
2. That the verdict is against the weight of the evidence.
3. That the verdict is against the law as declared by the court.
4. That the court gave plaintiff's instructions numbered 2, 3, 4, and 5 as modified by the court.
5. That the court refused defendant's instructions numbered 1, 2, 3, 4, 6, 7, 8, and 10, and refused defendant's instruction No. 5, as asked, but modified the same.
6. That the charge of the court to the jury was erroneous.

W. P. HALL, J. H. SHANKLIN, AND M. A. LOW,
Attorneys for Defendants.

Which motion was forthwith taken up and considered by the court, and the court being fully advised in overruled the same, to which ruling and judgment of the court in overruling defendant's motion for a new trial defendant's counsel at the time excepted.

And defendant's counsel tenders here in court this its bill of exceptions, and prays that the same may be signed and sealed and made a part of the record in this cause, which is accordingly done this 21 day of November, 1874.

70 JOHN F. DILLON, *Judge.*

And afterwards, to wit, at the same term of said court, and on the 14th day of December, 1874, the following appears of record in said cause, to wit:

THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company, plaintiff in error,
vs.
HAMILTON HOUSTON, DEFENDANT IN ERROR.

Now comes the plaintiff in error, by its attorneys, Hall and Shanklin, and presents to the court here its supersedeas bond in the penal sum of ten thousand dollars, which is now here by the court approved.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, The Chicago, Rock Island and Pacific Railroad Company and Hugh Riddle and J. H. Shanklin, are held and firmly bound unto Hamilton Houston in the full and just sum of ten thousand (10,000) dollars, to be paid to the said Hamilton Houston, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this ninth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the November term, A.D. 1874, of the circuit court of the United States for the western district of Missouri, in a suit
71 depending in said court, between Hamilton Houston, plaintiff, and The Chicago, Rock Island and Pacific Railroad Company, defendant, judgment was rendered against the said The Chicago, Rock Island and Pacific Railroad Company, and the said The Chicago, Rock Island and Pacific Railroad Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Hamilton Houston citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said The

Chicago, Rock Island and Pacific Railroad Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

{SEAL OF THE C., R. I. & P. R. R. CO.}

THE CHICAGO, ROCK ISLAND AND PACIFIC R. R. CO.,
By HUGH RIDDLE, *Vice-President.* [SEAL.]
HUGH RIDDLE. [SEAL.]
J. H. SHANKLIN. [SEAL.]

Approved by—

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

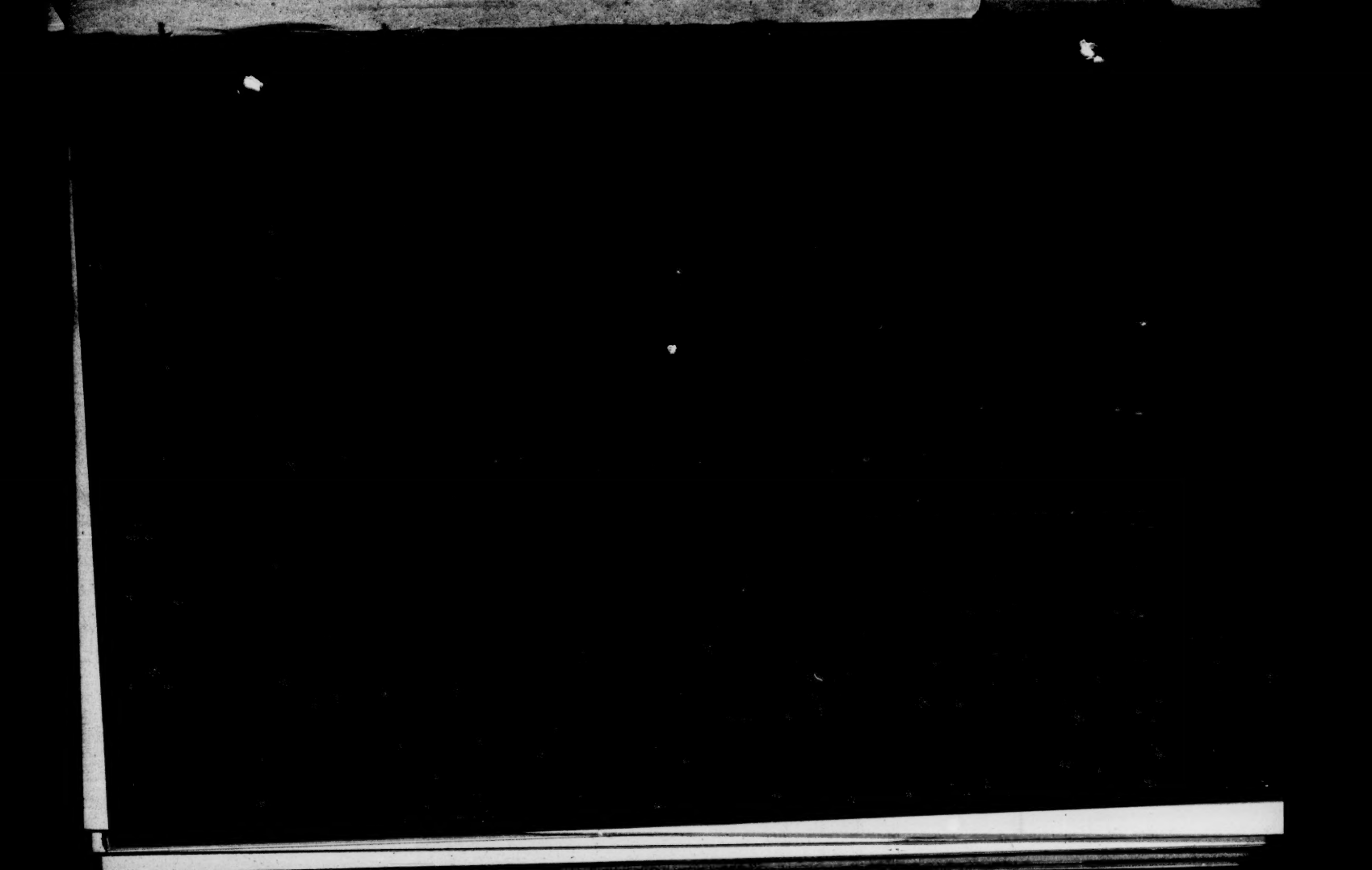
I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, do hereby certify that the above and foregoing is a true and complete transcript in the above-entitled cause of the record and proceedings had, as fully as the same appear in my said office.

72 In witness whereof I have hereto set my hand and affixed the seal of said court this 16th day of December, A. D. 1874.

M. M. PRICE, *Clerk,*
By C. M. WARD, *Deputy.*

[Here follows diagram marked page 72.]

(Indorsement on cover:) No. 109. The Chicago, Rock Island and Pacific Railroad Company, plaintiff in error, vs. Hamilton Houston. W. Missouri C. C. U. S. Filed 6th September, 1874.



Supreme Court of the United States.

No. 109.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

VERSUS

HAMILTON HOUSTON.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

ARGUMENT

OF

THOMAS F. WITHROW,

FOR THE PLAINTIFF IN ERROR.

CAMERON, AMBERG & CO. STATIONERS, CHICAGO.

SUPREME COURT OF THE UNITED STATES.

No. 109.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

VERSUS

HAMILTON HOUSTON, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

THIS action was brought in the Circuit Court of Clinton County, of the State of Missouri, to recover the penalty imposed by the following statute of that State:

"SEC. 2. Whenever any person shall die from an injury, resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars; or of any master, pilot, engineer, agent or employe, whilst running, conducting or managing any steamboat, or any of the machinery thereof; or of any driver of any stage coach, or other public conveyance, whilst in charge of the same as a driver: and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof: or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car,

stage coach, or other public conveyance, at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered: First, by the husband or wife of the deceased; or, Second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, Third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not a eegligent defect or insufficiency." (1 Wag. Stat., chap. 43, § 2, p. 519.)

The petition filed by the plaintiff below, Hamilton Houston, alleged substantially, that on the 13th day of March, 1872, the servants of the defendant railway company (plaintiff in error here), did, by "negligence, unskillfulness and with criminal intent," run a locomotive and train of cars upon Mary Houston, the wife of the said plaintiff, in the village of Cameron, in the said State of Missouri, inflicting injuries of which she died on that day.

On the application of the defendant, as a non-resident corporation, the forum was changed to the Circuit Court of the United States for the Western District of Missouri. The answer filed by the defendant, in that court, denied the allegagations of the petition, and alleged that the death of said Mary Houston was occasioned by her own carelessness and recklessness, (Rec., p. 10). Replication was filed, joining issue, (Rec., p. 11).

The cause came on for trial at the November Term, 1874, the Hon. JOHN F. DILLON, Circuit Judge, presiding. The evidence is set out in the record, not for the purpose of asking the Court to review the verdict, but for the reason that it is impossible to intelligibly examine the charge of the Court to the jury in the absence of any portion of the material evidence submitted on the trial.

The defendant has two tracks,—one main, the other a side track,—extending through a considerable portion of the village of Cameron. The map, the original of which is in the manuscript transcript, and an exact lithograph of which is incorporated in this statement, shows the location of these tracks with regard to each other and the public streets; also, the location of the plaintiff's house and other structures, a knowledge of which is material to a correct understanding of the case. The plaintiff's house was situated near the corner of Second and Harris streets. A building known as a section-house was located upon the railroad company's right of way, and distant in a south-easterly direction about 175 feet from Houston's house. There was a well upon the railway company's right of way near to, but east of, the section-house.

At the time of the occurrence of the accident, which is the basis of this action, a gravel train had been switched from the main to the side track, and was standing upon that track between the section-house and the depot. Freight cars were standing upon the side track, extending from the plank crossing on Harris street, in a westerly direction for some distance. The exact distance is not established by the evidence. There was a plank crossing over the rails of these tracks on Harris street. When cars were not standing upon either the main or side track east of Harris street, there was no obstruction which would prevent a person passing in a direct, or nearly direct, line from Houston's house to the section-house, and persons sometimes passed by way of the street across the railway, and sometimes crossed the railway upon the private right of way, east of Harris street.

On the 13th day of March, 1874, the passenger train from the west was due at Cameron at 6:30 P. M. (Rec., p. 23, fo. 43; p. 24, fo. 45; p. 25, fo. 48; p. 26, fo. 50; p. 27, fo. 52.) The plaintiff's wife, Mary Houston, left her husband's house on

that evening, at about half-past six o'clock. She took a pail upon her arm, and, it is supposed, started for water to the well near the east end of the section-house. (Rec., p. 13, fo. 22). Her daughter saw her as she left the house on that evening. (Rec., p. 14, fo. 23). No one saw her thereafter until the moment she was struck by the engine which was drawing the passenger train coming from the west. She was then on the main track of the railroad, on the company's private right of way, about 90 feet east of Harris street crossing and south of Second street. When discovered the engine was within four feet of her. She seemed to be passing from the track to the south and, when struck, was south of the south rail of the main track. She was not seen by any one on Harris street, or at any point nearer to it than her own house. She was struck by the extreme end of the beam of timber running across the engine, commonly known as the bumper, and fell in a ditch about ten feet from the section-house. (Rec., p. 23, fo. 44). She died within an hour after receiving the injury.

The railway was in plain view from the house. It was a bright, moonlight evening. (Rec., p. 16, fo. 27; p. 21, fo. 40). A train approaching from the west could be seen three-quarters of a mile from Houston's house, (Rec., p. 21, fo 40), and from any point between the Harris-street crossing and the section-house. Houston had lived in that house about six weeks; the train had been running on the same time for about six months. (Rec., p. 21, fo. 39). The head-light was burning and the movement of the train created a loud noise.

There is a conflict of evidence upon the following points:

First: As to whether or not the train was on time that evening.

Second: As to the rate of speed at which it was running.

Third: As to whether or not the bell was rung.

Fourth: As to whether or not the whistle was sounded.

Many of the witnesses introduced by the plaintiff, for the purpose of proving that the bell was not rung and the whistle not sounded, admitted that their attention was directed to the train at different points, along a space of half a mile, by the noise which it made in moving.

The questions presented arise upon the ruling of the Court in refusing, modifying and giving instructions to the jury.

In the following assignment of errors, the rulings complained of are referred to, generally, by the page and folio of the record at which they are stated. In the argument which follows the assignment they are set out *in extenso:*

ASSIGNMENT OF ERRORS.

There was error in the ruling of the Court below to the prejudice of the plaintiff in error, as follows:

First: In the assumption by the Court, in the charge given to the jury, upon its own motion, (1) That there was a conflict of evidence as to whether deceased crossed, or attempted to cross the track of the plaintiff in error at the Harris-street crossing, in the village of Cameron; and, (2) That there was evidence tending to show that the view of the deceased, when entering upon the tracks of said plaintiff in error, was obstructed by cars upon the side track in the vicinity of the place of accident, or otherwise. (Rec., p. 32, fol. 63.)

Second: By refusing to charge the jury that they must find for the defendant below — the plaintiff in error here — as

asked in the first instruction moved by said party. (Rec., p. 30, fol. 58.)

Third: In refusing to give the instruction asked by plaintiff in error marked "5," rec., p. 30, fols. 59-60. Also, in modifying the same against the objection of the plaintiff in error.

Fourth: In refusing to give the instruction asked by the plaintiff in error marked "6," rec., p. 30, fol. 60.

Fifth: In refusing to give the instruction asked by plaintiff in error marked "7," rec. 31, fol. 61.

Sixth: In refusing to give the instruction asked by plaintiff in error marked "8," rec., p. 31, fol. 61; and in giving the first instruction asked by defendant in error, rec., p. 59, fol. 57.

Seventh: In giving the instruction asked by the defendant in error, rec., p. 29, fol. 58.

Eighth: In giving the instruction set out in rec., p. 33, fol. 66, second paragraph.

ARGUMENT.

In the presentation of the several errors assigned, the rulings complained of are stated in the language of the record. In some instances, extended quotations are made from the adjudged cases cited. While this method apparently increases the length of the argument, it is believed that it will aid the Court in the consideration of the questions presented, by calling attention directly to the ruling claimed to be in point.

I.

In the instructions given by the Court upon its own motion, it was assumed that evidence had been submitted tending to show:

First: That the deceased was struck while attempting to cross the railroad track at a public crossing. (Rec., p. 32, fol. 63.)

Second: That there was evidence tending to show that a view of the track on which the train was approaching was obstructed by cars on the side track in the vicinity of the injury or "otherwise." (Rec., p. 32, fol. 63.)

Upon these points, as will presently appear, there was not the slightest conflict in the evidence. The language complained of is not a mere comment upon the weight of evidence. It is one thing to comment upon the effect of evidence, and quite another to assume its existence when it has none.

The Michigan Bank v. *Eldred*, 9 Wall., 553, is directly in point. Said Mr. Justice CLIFFORD:

> "But the second assumption of the instruction is even more unjustifiable than the first, as it imputes concerted action and a corrupt agreement between the maker of the note and the plaintiffs to defraud the defendant, *when in point of fact there is not a particle of evidence in the record to sustain the charge, or which has any tendency to support any such theory.* When a prayer for instruction is presented to the Court, and there is no evidence in the case to support the theory of fact which it assumes, the prayer for instruction should be denied. *And if given by the Court it is error, as the tendency of such an instruction is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.* Such a charge does not aid the jury in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In *The United States* v. *Breiting*, 20 How., 255, approved in the *Improvement Company* v. *Munson*, 14 Wall., 448, such charges are more severely condemned.

Similar language was used in —

Goodman v. *Simmonds*, 20 How., 359.

The Court erred "*in submitting the decision of questions when there was no evidence to raise them.*"

Chandler v. *Von Roeder et al*, 24 How., 227.

In *The Milwaukee & St. Paul Railroad Company* v. *Arms et al.*, 90 U. S. Rep., 489, the Court below instructed the jury:

"If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give the plaintiffs punitive or exemplary damages."

The case was reversed upon the ground that the undisputed facts, as shown by the evidence, did not warrant the instruction. The soundness of the proposition of law enunciated was admitted, but the judgment reversed because it was not applicable to the facts of the case.

The daughter of Mrs. Houston saw her as she "left the house that evening to go after water." She "did not see her after she got out of the house" until after the injury. (Rec., pp. 13 and 14, latter part of fol. 22.) The witness who saw her next was the engineer on the train. He said:

The injury occurred about ninety feet east of the crossing of Harris street. I saw Mrs. Houston almost at the same instant I struck her. She was on the outside of the rail, on the right hand of the track and on the south side of the road. The time elapsing between the time I saw Mrs. Houston and the time the engine struck her may have been five seconds. When I first saw her she appeared as coming from the track; it appeared as an object just coming into view when the engine struck her. The bumper is a large stick of timber or beam, with the end of the beam on the right hand side. She was knocked into the ditch on the right hand side. She fell into the ditch about ten feet from the northwest corner of the section-house. * * * The engine was about four feet from Mrs. Houston when I first saw her. (Rec., pp. 23 and 24, fol. 44.)

This evidence is not only not contradicted, but it is *all there is upon the subject.* The acumen which can discover anything in it tending to show that she was struck at the public crossing is somewhat marvelous.

Again, the jury was properly told that the head-light of the advancing engine was burning; that the track was nearly straight for a half mile, or more, to the west; that the ground was not rough, and that "*the light could have been seen for some distance to the west if the view was not obstructed by cars on the side track in the vicinity of the injury or otherwise.* (Rec., p. 32, fol. 63.)

In this, the Court assumed that there was evidence in the record tending to show that the cars on the side track obstructed the view of the head-light, or that it was obstructed "otherwise." Where is the evidence on which this assumption was founded? No witness testified that the cars on the side track obstructed the view toward the west. The map in the record (a correct lithograph of which accompanies this argument) is drawn to a scale, and with exact curvatures. To that map let the evidence be applied, with a view to discovering the foundation of this instruction.

KERWIN, the conductor of the construction train, placed it on the east end of the side track, to let the passenger train pass. He could not say whether any portion of his train was opposite the section house near which the accident occurred. (Rec., p. 15, fol. 25.) It cannot be assumed that the train, which was standing east of the place of collision, obstructed the view to the west. But THOMAS COLLINS came nearer to the point. He saw the passenger train moving eastward, and "saw it pass freight cars on the side track *west* of the crossing on Harris street. He did not notice whether there were any opposite the section house, but he is certain that they stood near to the plank crossing on Harris street, but

the crossing was open. The crossing is on or near the center of the street. The freight cars on the side track were on the north side of the main track." (Rec., p. 17, fol. 29.)

JOHN DONOVAN lived about four hundred feet from Houston, on Second street, and saw freight cars on the side track opposite his house, "extending down to Harris street. *They did not extend beyond it.*" And he did not think there were any cars on the side track east of that street. (Rec., p. 21, fol. 39.) The main track was on the south side, and "the side track was north of the main track. The freight cars stood on the switch on the north track." (Rec., p. 21, fol. 40.)

EDWARD WHEELER: "The construction train came on the side track east of Harris street, a little while before the passenger train came in." (Rec., p. 22, fol. 41.)

This, with the map, is all of the evidence relating to obstruction by cars on the side track or "otherwise." Upon this undisputed evidence there was no question, as to the effect of the cars upon the side track, to submit to the jury. It is impossible to so distort the testimony as to make an obstruction of the cars from any position midway between the two tracks from the middle of Harris street to the point where deceased was struck. No freight car standing on the side track at or west of Harris-street crossing could obstruct the view of the north rail of the main track for a distance of fourteen hundred feet. The position of the cars is undisputed, as is the location and relative distances of the tracks. A straight line from a point half way between the tracks to a point fourteen hundred feet, will not be within several feet of any freight car on the side track.

There would be just as much propriety in submitting to the jury the question whether a straight line is the shortest distance between two given points.

Artz v. *The Chicago, Rock Island & Pacific Railroad Company*, 34 Iowa, 159 is directly in point upon a much stronger condition of evidence. It was claimed in that case, as was assumed by the Court in this, that there was a conflict of evidence as to obstructions in the view of the track. The facts are thus stated by the court:

"The testimony shows without conflict, and upon this the counsel do not differ, that the railroad and highway are nearly upon a level, and run substantially parallel for a considerable distance, and are in plain view of each other; that for the distance of at least six hundred and sixty feet before the plaintiff reached the crossing he could have an unobstructed view of the railroad and the trains upon it for at least two hundred and ten feet, and this distance of view would increase as he approached the crossing; that the plaintiff was familiar with the locality, and the train was about on time, and with the head-light burning. This being true, *we hold as a matter of law that the plaintiff can not recover*, since his own negligence must have contributed to the injury"

"But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train but did not; and that the testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. *The difficulty, however, with the position is, that the conceded or undisputed facts being true, this testimony can not in the very nature of things be also true. It constitutes, therefore, no conflict.* Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that at the time he looked, and did not see it shine, could this testimony be true? * * * But, after all, in the very nature of things it can not be true, and hence can not, in the law, *form any basis for a conflict upon which to rest a verdict.*"

In this case no witness testified that the head-light could not be seen. The suggestion that the cars on the side track might obstruct the view, first appears in the charge given by the Court on its *own* motion.

What evidence tended to show that obstructions "otherwise" prevented a view of the approaching head-light? The effect of these instructions was to "induce" or lead the jury into the field of speculation.

II.

The defendant asked the Court to charge the jury:

"Under the evidence in this case the jury must find for the defendant." (Rec., p. 50, fol. 58.)

This instruction should have been given, even if it was conceded that the weight of evidence was against the defendant upon all points upon which there was any conflict. The instruction is in the nature of a demurrer to the evidence.

The action was to recover a penalty imposed by the statute of the State of Missouri, above copied. The decisions of the Supreme Court of Missouri, construing the statute and defining the rights of parties under it, are controlling in the Federal Courts. Since the trial of this cause in the court below, an opinion has been announced by the Supreme Court of Missouri, in a case the facts of which are strikingly similar to those in the one at bar, conceding that all disputed points in this case are with the plaintiff below. We allude to

Harlan v. *The St. Louis, Kansas City & Northern Railroad Company*, 64 Mo., 480.

The facts are thus stated in the opinion of the Court, delivered by NAPTON, J.:

"The petition in this case was under the second section of the Damage Act, for the negligent killing of the plaintiff's husband by a locomotive of the defendant. The answer of the defendant after denying the allegations of the petition, set up as a defense, that the plaintiff's own negligence was the cause of the disaster. The evidence in the case, in which there was no conflict, established the following state of facts: The deceased, who lived in the town of Moberly, was passing from the east side of the railroad, on a frequented path leading over the tracks, in the middle of a clear day in November, and was killed by what is called a pony-engine, running backwards on the main track. He stepped from behind some cars standing on the side track, which was seven feet from the main track, and was killed by this engine almost immediately. He wore a fur cap with ears to it, but it seems from the testimony that his

hearing and eyesight were ordinarily good. The bell on the pony-engine having no rope to it was not sounded by the engineer, and there was a freight train on the adjoining track about fifty feet off, on which there was a bell ringing which could be heard all over town. The locomotive that killed Harlan could be heard when in motion without a bell, at a distance varying from one hundred to two hundred yards. The engineer of this locomotive did not see Harlan till he was run over, the engine going backwards. The track was a straight one, and the engine could have been seen at a considerable distance. There was no possibility of stopping it, had the engineer seen Harlan before he was struck, so as to avoid the disaster that occurred."

The petition in that case was under the statute copied in the statement—and so it was in this. In that, the wife sought to recover for the negligent killing of her husband—in this, the husband seeks to recover for the negligent killing of his wife. In that, the deceased lived in the town of Moberly—in this, she lived in the village of Cameron. In that, he passed from the east side of the railroad on to the tracks—in this, she passed from the north. In that, he moved on a frequented path—in this, there was a path on which she could have moved, but as to whether she did or not, the evidence is silent. In that, the accident occurred in the middle of a clear day in November—in this, it was early in a clear moonlight evening, and a head-light was burning on the engine. In that the engine which inflicted the injury was a pony-engine moving backwards—in this, the engine was drawing a passenger train which had been arriving at that point at about that time for six months. In that, the deceased stepped from behind some cars standing on the side track, about seven feet distant from the main track—in this, some cars were standing on the side track *west* of the Harris-street crossing: how near deceased was to them when she crossed the side track is not known. It will be presumed that there was at least the same distance between the tracks, as a shorter distance would render the tracks useless. This presumption is supported by the map, drawn to a scale. In that case the deceased wore a fur

cap, and his sight and hearing were ordinarily good — in this she wore nothing on her head save a net, and the evidence is silent as to her sight and hearing. In that, *there was no bell-rope on the pony-engine, and the bell could not be rung*—in this, there is a stout conflict of evidence as to the ringing of the bell, and all that can be claimed is that it was not rung. In that, a freight train stood upon a side track, about fifty feet away, upon which a bell was ringing, "which could be heard all over town"—in this, a construction train was standing upon the side track, at a greater distance, but there is no claim that any bell was ringing upon it. In that, the pony-engine could be heard a distance "varying from one to two hundred yards"—in this, the plaintiff's witnesses, some of whom were in their own houses, heard the train distances varying from a few hundred feet to a half mile. In that, the engineer did not see deceased before the engine struck—in this, he saw her when the engine was within four feet of her: not over five seconds before the collision. In that, the track "was a straight one, and the engine could be seen at a considerable distance" —in this, in the language of the learned Judge who charged the jury, "the track was nearly straight for half a mile or more to the west."

Can it be disputed that the Harlan case is a stronger one against the defendant than this? In that case the Supreme Court of Missouri held, *as a matter of law*, that there was no liability under the statute. The opinion is not long, and we copy it entire:

"The instructions given by the Court to the jury were undoubtedly the law, and distinctly declared that the plaintiff could not recover, if the disaster was produced by Harlan's own negligence, although the bell was not sounded, provided the engineer could not have prevented the accident. The jury, however, found a verdict for the plaintiff.

"The principles of law applicable to this case are so well established that we deem any citation of authority unnecessary. They

are cited at length in the brief of appellant's counsel. A person who goes on a railroad track, or proposes to cross it, *must use his eyes and ears to avoid injury*. A neglect of regulations in regard to bell ringing may amount to negligence in law on the part of the railroad employes, but does not absolve strangers who propose to cross the track from ordinary care. Indeed, every intelligent person who has arrived at years of discretion, is presumed to know that it is dangerous to be on a railroad track when trains are passing to and fro; and when crossing one he is expected to be vigilant and watchful of the approach of a locomotive. The failure to exercise such vigilance is negligence *per se*. *Conceding, in this case, that the failure to ring the bell was negligence on the part of defendant's servants, yet Harlan could both see and hear the locomotive, if he had looked or listened, and his stepping on the track on the approach of the engine, at a slow rate of speed, appears unaccountable.* He seems to have either been absorbed in thought, or concluded, after he saw the engine, that he could cross safely, although it was so near as to make the experiment exceedingly hazardous. The company are not responsible for the result of such an experiment, unless the engineer, after seeing the hazardous position of Harlan, could have avoided injuring him. Of course, no amount of negligence on the part of a stranger would authorize a railroad engineer to run over him, if there was a possibility of avoiding it; but it is proved in this case by plaintiff's own witness, that the engineer did not see Harlan until he was killed, and that, if he had seen him, there was no possibility of stopping the engine in time to have avoided the injury. *The failure to ring the bell on the engine, and the sound of bells on the freight train, might have misled Harlan if he trusted to hearing alone, although the evidence on both sides clearly shows that the movements of the pony-engine, without a bell, could be heard at least fifty yards.* This, however, does not account for the failure of Harlan to see the engine when he stepped from behind the cars on the side track. *He was seven feet still from the main track, on which the switch engine was clearly in sight and in motion, and it was about the middle of a clear day, between one and two o'clock.* He must, therefore, either have been totally absorbed in other subjects, or have concluded to take the risks. There is no ground for holding the railroad company responsible for the result of such recklessness.

"*The Circuit Court might have refused to submit such a case to the jury, had an instruction to that effect been asked.* Certainly a verdict against instructions should have been set aside.

"The question discussed in this case in regard to the form of the petition, in view of the conclusion we have reached on the merits, we deem it unnecessary to consider.

"The judgment is reversed, and the case remanded.

"The other Judges concurred."

This is conclusive as to the right of the plaintiff under the statute. It is not a ruling upon a general principle of law which the Federal Courts may or may not follow. The plaintiff seeks to recover a penalty imposed by statute, and the decision of the highest court of the state affecting his rights under the statute are as obligatory upon this court as the act itself.

If this position is not tenable, a little examination will show that the decision in the *Harlan Case* is sound as a proposition of general law. Let it be remembered that deceased was upon the private right of way of the plaintiff in error. In

The Philadelphia & Reading Railroad Company v. *Hammill*, 44 Pa. St., 379,

STRONG, J., thus tersely stated the duties of a railroad company with regard to such trespassers:

"There is as perfect a duty to guard against injury from a night intruder into one's bed-chamber as there is to look out for traspassers upon a railroad where the public has no right to be, and the rule must be the same whether the railroad is in the vicinage of many or few inhabitants. In the one case as in the other, going upon it is unlawful, and therefore need not be expected. In this case it appears that there are fifteen houses between the railway and the public highway, all but two of them built since the railroad was constructed. The danger of trespassing may have been increased by the increase of the population, but the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusion upon his rights.

A clear exposition of the law upon the same subject is found in the charge of Mr. Justice MILLER in the oft cited case of *Finlayson* v. *The Railroad Company*, reported in 1 Dill. Cir. Ct. Reps., at page 583.

In that charge the learned judge who tried this cause below concurred. Finlayson was walking upon a private right of way, near a highway, and in the vicinity of a public work where blasting and the blowing of whistles created a great

noise. He was struck by a train moving in the same direction, and killed. Mr. Justice MILLER, after stating what would constitute negligence on the part of defendant, said:

"If, however, you find that the railroad company's agents were guilty of negligence, there is still a further inquiry before you can find a verdict in behalf of the plaintiff, and that is the amount of care and precaution which he took to avoid this accident. I lay it down to you that he had no legal right to be on that railroad track; the track at that place not being a crossing or any part of a public highway, was private property; that it was built for other purposes; that it was not built to be walked upon by the public, and the fact that persons did walk upon it, however frequently and however commonly, does not change the proposition of law. This man had no right to be there, and he should not have been there. It does not follow, however, because he was there unlawfully, that the other party could run him down; but it does follow that he, being on private property of the company, on a track which is used for a purpose which is dangerous to human life, well known to him — that he being in a place where he ought not to be, that he was bound to use every precaution, every diligence, every care, against the possibility or probability of any danger which might happen to him there.

"This was his duty, and it was imperative; and if you find, in the language of one of the counsel for the plaintiff, that he was going along the track with his hands in his pockets, his head down, and his attention abstracted from everything around him, then he was guilty of such negligence as forbids recovery. No man has a right to go upon a railroad track, in such a place, and go along in a state of abstraction, careless of what might happen to him, and then turn around, and say to the railroad company, however negligent they may have been, 'You are responsible for my safety.' If he is careless himself, it cannot be expected that the railroads can be made to take care of him, and pay for him if he is killed. Being on a track, and walking in a direction where a railroad train might overtake him, reasonable care required of him that he should be vigilant and watchful to discover the approach of any train, and especially from behind; and this vigilance on his part should be increased from the fact that the noise from the trains and the blasting on the canal, would tend to prevent his hearing the noise made by the approach of a car or train, or its bell or its whistle."

This rule has been followed in every State in which similar questions have since arisen. One of the most noticeable of the cases was recently decided by the Supreme Court of the State of Illinois.

The Illinois Central Railroad Company v. *Godfrey*, 71 Ill., 501.

It is so directly in point that it merits careful examination. The railroad of the plaintiff in error consisted of three tracks, running in almost a right line for a distance of some five hundred feet south and over two hundred feet north from the crossing of the Toledo, Wabash and Western Railway, in the town of Decatur. The middle and west tracks were seven and two-tenth feet apart. The defendant in error entered upon the road of the plaintiff in error at the crossing of the Toledo, Wabash and Western, and walked north, between the west and middle tracks, to the point where the accident occurred.

On the trial, he testified that he passed over the Toledo, Wabash and Western, and while doing so, looked behind him, and saw no engine. That he then entered upon the track of the Illinois Central Railway, where the roads crossed, and at a point where he had passed a great many times during the preceding seven years; that he was walking between the two west tracks, and had got about twenty steps north of the Toledo, Wabash and Western, when he heard some one call to him to look out, but before he could do so he was struck.

On the trial, the Court was asked to instruct the jury:

"The Court instructs for the defendant, *that defendant by the law had the right to the exclusive use of its right of way and tracks for the purpose of conducting its business as a common carrier, and that plaintiff had no right by the law to be on such right of way, or to do anything which would delay the defendant in the prosecution of its legitimate business, or which would obstruct or impede the progress of the engines being lawfully used by defendant in its business.* And if the jury believe from the evidence, *that the plaintiff was so upon the right of way of the defendant at the time he received the injury complained of, then, unless the jury believe from the evidence, that Adams, the engineer* (if they believe from the evidence that he was the engineer) *in charge of the engine, saw the plaintiff, and saw that he was in danger, and could have prevented the injury, and would not, but willfully went on when he could have stopped,—the jury must find for the defendant.*"

The substance of this instruction was repeated in the next, the fourteenth, which was asked and refused, but to it was added these words:

—"because the defendant in the use of its road *is not bound to keep a look out on its own ground, as against those having no lawful right on the road,* but may use the same for its own purpose, in its own way, and any person going on its track without permission, at such place, *is there at his own peril and in his own wrong, and therefore, if he is injured, he can not recover because his own neglect or carelessness has contributed thereto,* unless the jury believe from the evidence, that the defendant was guilty of gross negligence, and willfully injured the plaintiff."

The Court was also asked to instruct further:

"The Court instructs for defendant, that when a party is on the right of way or track of a railroad, and in danger, the railroad company can not be held liable in damages for injury that may be sustained under such circumstances, unless the evidence shows to the satisfaction of the jury, that the servant or servants of the Company were guilty of negligence so gross *as to amount to a willful disregard of the rights and safety of the party in danger,* and under such circumstances as show servants might avoid the difficulty and would not; and if the jury believe from the evidence in this case, that the plaintiff received the injuries complained of while on the right of way of defendant, within eighteen inches of the track, then, unless they believe from the evidence, that the engineer in charge of the engine, *knew of the danger of plaintiff,* and had it in his power to avert the danger and save the plaintiff, and did not do so, the jury must find for the defendant."

These instruction were refused. The Supreme Court said of them:

"The principle embodied in defendant's refused instructions is in conformity with the views here expressed, and, as applied to the facts of this case, we regard them as substantially correct, and that they should have been given."

The Court said further:

"The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience, as a footway in reaching his home on return from a search after his cow. *There was nothing to exempt him from the character of a wrong-doer and trespasser in so doing, further than*

the supposed implied assent of the company arising from their non-interference with a previous like practice by individuals. But because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. *The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils.* At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate, will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. *Sweeny* v. *Old Colony and Newport Railway Co.*, 10 Allen, 373; *Hickey* v. *Boston & Lowell Railway Co.*, 14 id., 429; *Philadelphia & Reading Railroad Co.* v. *Hummel*, 44 Penn. St., 375; *Gillis* v. *The Pennsylvania Railway Co.*, 59 id., 129.

"*For all the purposes of this suit, the plaintiff stands in no more favorable condition than that of a wrong-doer and trespasser.* He was not at the time of the accident in the exercise of a legal right, and was in the enjoyment of no more than a bare license or assent tacitly given, and his duty and the obligation of the company are to be measured as in the case of one thus situated. Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it. But where the plaintiff is himself in the wrong, or not in the exercise of a legal right, or was at the time enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, he, the plaintiff, must use extraordinary care before he can complain of the negligence of another." *Aurora Branch Railroad Co.*, v. *Grimes*, 13 Ill., 585.

"As a general rule, it is culpable negligence to cross the track of a railroad, at a highway crossing, without looking in every direction that the rails run to ascertain whether a train is approaching. (Shearman and Redfield on Negligence, Sec. 488, and cases cited in note.) And the same degree of care and precaution, of course, should be required on the part of one traveling laterally upon the track.

"With increased force did this requirement apply to this plaintiff, who was not lawfully using the railroad track. He only says that, when he went on to the road, he looked and saw no engine. *But this is not enough. He should have kept constant watch, while he was traveling along the track, for the approach of an engine.* Besides, there was ample space between the track for plaintiff to have walked, without exposure to danger on either track; and there would seem to have been an omission of due care, in not so walking in the place where he was as not to place himself needlessly within striking distance of the engine."

The cases concur in holding, that as to trespassers on the private right of way, the company is liable only for *willful* negligence. While willful negligence was alleged in the petition, it will not be claimed that there is any evidence tending to support the allegation.

The Supreme Court of Missouri declared, in the Harlan Case, *supra*, that upon the application of the defendant, the Court should have refused to submit the case to the jury.

The duty of the Court in such cases is very clearly and concisely stated by the Court in the case of

Pleasants v. *Fant*, 22 Wall,, 116.

When, it is manifest that, upon the evidence, it would be the duty of the Court to set aside a verdict against a party, it is its duty to charge the jury not to return such a verdict. The doctrine which has afforded so much comfort to timid judges — that a mere scintilla of evidence may create a conflict — was exploded in

The Improvement Company v. *Munson*, 14 Wall., 448,

which was cited, approved, and followed in *Pleasants* v. *Fant*, *supra*. In *The Improvement Company* v. *Munson*, Mr. Justice CLIFFORD, in delivering the opinion of the Court, said:

"Nor are judges any longer required to submit a question to a jury merely because *some* evidence has been introduced by the party bearing the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that what was called a *scintilla* of evidence in support of a case, the judge was bound to leave it to the jury, but recent decisions of a high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

In the light of the *Harlan Case* there can be no doubt that upon the evidence in this the jury could not "properly proceed to find a verdict for" the plaintiff below, and the Court should have so said.

But it may be said, negligence is a question of fact for the jury. So it is when the issue is mixed of law and fact. When there is no conflict as to the facts out of which it arises, it becomes a question of law for the Court. And whether this be sound or not, cases involving negligence present no exceptions to the rule that there is a "preliminary question for the judge," which must be determined before any of the evidence goes to the jury.

Wilds v. *The Hudson River Railway Company*, 24 N. Y. Rep., 433,

is directly in point :

"Another preliminary point (to be passed upon generally before we can decide as to its being applicable to this case) is the claim, that the question of negligence belongs peculiarly to the jury, and that cases involving that question should never be taken from them to be decided by the court. To this position it should be answered that there is no case known to the law (even the question of fraud, in certain cases where the statute says it is to be submitted to the jury) in which an appellate court has not, and does not on proper occasions exercise, the power of setting aside the verdict of a jury, not merely when it is entirely against evidence, but when it is clearly against the weight of evidence. *And no court can be guilty of the absurdity of holding that, in such a case, it would* not have been competent for the judge who tried the cause, either to non-suit the plaintiff or *direct a verdict in his favor*, as the case might have required. No legal principle compels him to allow a jury to render a *merely idle verdict*.

"The full extent of this position has been held by this Court (*Johnson* v. *Hudson River Railroad Company*, 20 N. Y., 73), in saying that '*to carry a case to the jury*, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned *solely* by the negligence of the defendant.' Can this be true without holding that, in every case where a verdict would be set aside as against the clear weight of evidence, the court should take the decision of the case from the jury? Cer-

tainly, it is not easy to conceive any other definite position which would be consistent with the decision."

In the well-considered case of

The Lake Shore and Michigan Southern Railroad Company v. *Miller*, 25 Mich., 274,

CHRISTIANCY, J., in an opinion in which the cases are collected and thoroughly examined, said:

"Juries may act upon the question of diligence when there is any evidence tending to prove it. If there be no such evidence, there is nothing before them upon which they can find such diligence. And the question of the relevancy of evidence, and its tendency to prove diligence, or whether there be any such evidence, is not a question for the jury, but a question of law for the court; and it must be decided by the court, and not by the jury. If the question of diligence and negligence were exclusively one of fact for the jury, without reference to any legal principle applicable to it, then it would necessarily follow that the jury, and not the court, must determine the relevancy and admissibility of evidence offered for the purpose of proving the one or the other. This clearly they could not do; the question is one of law, and we are bound to determine, in the present case, whether there was any evidence tending to prove diligence on the part of the plaintiff and Eldridge. I think, as I have endeavored to show, there was no such evidence in the case."

III.

Defendant also asked the court below to instruct the jury (Rec. p. 30, fol. 59) in the language of the following paragraph, minus the words printed in italic:

"A railroad company has the right to the exclusive use of its track and right of way, except at a public highway or street crossing. A railroad track is not built to be walked upon by the public, and the fact that persons do walk upon it, however frequently, and however commonly, does not change that proposition of law. If Mrs. Houston was on the track of defendants where there was no street crossing, she was where she had no right to be, and being in a place where she had no right to be, she was bound to use every reasonable precaution, diligence and care against the possibility of any damage which might happen to her there. This was her imperative duty, and it was especially her duty to be vigilant and watchful to discover the approach of any train; and if the jury believe from the evidence that she was not vigilant and watchful to discover the

approach of the train in proof, *and that by the exercise of vigilance and care she could have so discovered the train in question, run and managed as it was, and thereby avoided the accident*, they will find for defendants, although they may also believe from the evidence, that defendant's employes did not sound the whistle of the locomotive in proof, or that they did not ring the bell, or were otherwise negligent."

The words in italic were inserted by the Court against defendant's objection.

The instruction *as asked* is substantially the one given by Mr. Justice MILLER in the *Finlayson Case*. Its modification was not warranted by any discrepancies between the facts of the two cases. The instruction prayed stated the law correctly. The modification was objectionable, because:

1. It ignores the difference between the rights of a traveler on a highway and a trespasser on the private right of way. The distinction is radical. The traveler has a right upon the crossing and to the exercise of a high degree of care by the company. The trespasser has no such right, and can demand only that he shall not be *willfully* run down.

This rule is unequivocally stated in the *Harlan* and *Finlayson Cases, supra*. The following paragraph from the opinion of SHELDON, J., in the *Godfrey Case*, states it sharply:

"The negligence of defendant alleged in the declaration is, in not ringing a bell or blowing a whistle before the engine crossed the railroad crossing, and in not slackening speed as it approached and passed over the crossing, and in running at a great rate of speed; and it is further insisted on in argument, as negligence, that there was no fireman employed on the engine, and that those in charge of the engine had their attention directed to the train on the other road near the crossing instead of forward along the track, *but the defendant under the circumstances of this case is clearly chargeable with no such negligence as this. It is only for wanton or willful injury that the defendant is here chargeable, or such gross negligence as evidences willfulness.* Notwithstanding the plaintiff was unlawfully upon defendant's right of way, or not in the exercise of a legal right, and that his own lack of ordinary care exposed him to the risk of injury, yet the defendant might not with impunity wantonly or willfully injure him. And if defendant's servants, who were in the management of the en-

gine, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him, defendant might be liable. And this, as we conceive, is the only measure of liability to be claimed under the facts of this case, laying out of view any breach of the ordinance, which will be hereafter referred to.

2. In any event there was no foundation in the evidence for this modification. In another division of this argument it is shown that, upon the undisputed evidence, the train was in plain view for a half mile before reaching the place of collision.

The Court assumed that there was evidence in the case tending to show that the deceased could not by the exercise of vigilance and care, discover "the train in question, run and managed as it was." The modification was not only unwarranted by the undisputed facts, but was manifestly inconsistent with them.

3. The effect of the modification was to tell the jury that, if a person enter upon the track of a railroad, upon a private right of way, under circumstances which would render the exercise of care and caution unavailing to discover an approaching train, he may recover for his injuries received because of the negligence (less than willful) of the Company's servants. *If the view was so obstructed that an approaching train could not be seen, it was the duty of the deceased to refrain from going upon the track.* It has been so held as to public crossings. In *Wild* v. *The Hudson River Railroad Company*, 29 N. Y., 325, DENIO, Ch. J., said:

"A crossing can rarely, if ever, be so situated as to render it impossible or difficult for a traveler to observe the track on each side for a sufficient distance to determine whether it is safe to proceed. *If such localities exist, they should not be crossed at all, and it would be equally imprudent in the railroad company to tolerate them, and in the passenger to use the crossing. If the case is such as to require the person wishing to cross, to come near the track to make his observation, that circumstance, so far from excusing him from the duty of looking at all, would only render his duty more imperative, if he would avoid the imputation of negligence.*

"The evidence in this case shows that the track of the railroad, east of Fourth-street crossing, was upon a straight course for a distance of at least six hundred and fifty feet from that crossing. Although there were buildings on the east side of Fourth street, yet the whole distance I have mentioned could be seen by a person approaching, as deceased did, on Fourth street, from the south, before entering upon the track. If the train had been beyond the range of his vision when he came near the crossing, there would have been ample time for him to drive leisurely across both tracks, which are together, including the space between them; but if he saw the train coming towards the crossing, and determined to try the speed of his horse against that of the approaching engine, he did it, I think, at his peril."

In *The Pennsylvania Railroad Company* v. *Beale*, 73 Pa. St., 504, SHARSWOOD, J., thus disposed of a modification of a charge quite like the one incorporated in the instruction now under consideration:

"The crossing at which he met with the injury which resulted in his death was a dangerous one, and, as he was well acquainted with it, there was a greater reason why he should exercise the utmost care and caution, by stopping before he attempted to pass over it. It is very clear that if he had done so but for a very few minutes the accident would not have happened. 'This evidence,' said the learned judge, in his charge, 'is uncontradicted, that there was a level piece of ground, ten feet wide, between the hill or bluff and the track, on the side where the deceased approached it.' It was his plain duty to have stopped at this place, and so the learned judge instructed the jury, but qualified his instruction by adding, '*If you find from the evidence, that the approach of the train might have been seen or heard from there.*'"

Compare this with the language of the modification of the court below—"and that by the exercise of vigilance and care she could have so discovered the train in question, run and managed as it was, and thereby avoided the accident." The difference between the cases consists in the facts that SHARSWOOD, J., was dealing with the conduct of a traveler at a public crossing, while in the other the injured party was a trespasser upon a private right of way. The opinion of the Court thus continues:

"This, in fact, left the question of negligence to the jury upon a point not material. Indeed, the duty of stopping is more manifest

when an approaching train can not be seen or heard than when it can. If the view of the track is unobstructed, and no train can be seen or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision, none takes place, and the sooner the traveler is across the track the better. But the fact of collision shows the necessity there was for stopping, and therefore in every case of collision the rule must be an unbending one. If a traveler can not see the track by looking, whether from fog or other cause, he should get out and, if necessary, lead his horse and wagon. A prudent and careful man would always do this at such a place."

"In the *Hanover Railway Company* v. *Coyle*, 5, P. F. Smith, 396, the plaintiff, a peddler, in the depth of winter was driving, inside of his covered wagon, with his head muffled up in a thick overcoat, and it appeared that a traveler passing in the direction he was going could not see up and down the track until within sixteen feet of it, yet these circumstances were not allowed to form any excuse for his neglect in omitting to stop.

* * * * * * *

"*The error of submitting the question to the jury, whether, if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should, upon the uncontradicted evidence, have directed a verdict for the defendant.*"

If it is the duty of the traveler to refrain from passing a public crossing so situated that danger cannot be discovered, what is the duty of one who enters the private yard of the company?

IV.

Akin to this is the question raised upon the defendant's further request to instruct the jury (Rec., p. 30, fol. 60):

"It is the imperative duty of a person who comes on a railroad track to stop, look and listen immediately before crossing, to ascertain if a train is approaching; and a failure to do this is negligence. * * * This duty to look and listen for approaching trains is even more obligatory to persons who walk along the track than it is to those who cross the track; and if the jury believe, from the evidence, that Mrs. Houston did not stop, look and listen for the train in proof, before she went on the track of defendants, or that after she went on said track, she did not look for said train, or that she saw or heard it, or could have seen or heard it, by looking or listening, in time to have avoided injury, they will find for defendants, although they may believe, from the evidence, that defendants, or their employes, were also careless or negligent."

This instruction was refused, and instead thereof a glittering generality was given to the jury to the effect that:

"She was bound at her peril to use all proper and reasonable care to avoid injury, and the care which she was bound to exercise would depend upon the danger which, as a reasonable being, bound to exercise a reasonable degree of care and prudence, she ought to have foreseen; that is, such a degree of care as persons generally, in such circumstances, would use; and if she did not, the plaintiff cannot recover, though the company was also negligent."

This was certainly general enough; but the Court continued, (Rec., p. 33, fol. 66):

"If, by the exercise of such a degree of care, she might have seen or heard the train — this train — run as it was on the particular occasion, and thus avoided the injury, the plaintiff cannot recover. Nor can he recover if his wife did see or hear the train, and formed the erroneous judgment that she could cross the track in safety."

Again the Court assumes, erroneously, that there is evidence tending to show that the train could not be discerned by the exercise of vigilance.

The instructions, given for the purpose of covering by general terms that which was specifically asked, *ignores the duty to look and listen before crossing a railroad track.* Under the circumstances of this case, can the duty be questioned? The deceased was entering the private right of way at about the time a passenger train was due. If a train could not be seen, she should not have entered — if it could be seen, her failure to look was negligence *per se.* Said SHARSWOOD, J., in the *Beale Case, supra:*

"There never was a more important principle settled, than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of neglect for the jury, but negligence *per se, and a question for the court.* (*The North Pennsylvania Railroad Company* v. *Heileman,* 13 Wright., 60.) It was important, not so much to the railroad companies as to the traveling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers on the trains; but they will do so again, if travelers crossing railroads are not taught their simple duty, not to themselves only, but to others."

In *The North Pennsylvania Railroad Company* v. *Heileman*, 49 Pa. St., 60., the Court below was asked to instruct the jury thus:

"It is the duty of the traveler approaching a railroad crossing to look along the line of road to see if a train is coming; and if the jury believe that the plaintiff failed to take such precaution, he is guilty of negligence, and cannot recover in this suit."

The Court disposed of the point by saying:

"This is one of the reasonable precautions a man is bound to use, and its absence is evidence of neglect."

The opinion of the Supreme Court was delivered by STRONG, J. In that opinion it was said:

"This was not a full answer to the point. The Court conceded that looking out for the approach of a train is a duty when a traveler is about to cross a railroad track; but instead of charging the jury that a failure to look out was negligence, instructed them that it was *evidence* of negligence. This was not all that the defendants asked, nor all that they were entitled to. The absence of such a precaution was more than evidence of neglect, *it was neglect itself*, and it was such as may have contributed directly to the injury, for the uncontradicted evidence was that the plaintiff drove his horse and wagon slowly upon the track, in front of a passing locomotive. If he did this without looking along the track, he acted without any precaution against a known danger, and he was not entitled to recover, if his want of precaution contributed to his hurt. * * *

"Now, that it is the duty of the traveler, when approaching an intersecting railroad with a common highway, to look out for approaching trains or engines the Court below asserted more than once, and correctly. That standard of duty is fixed by the law. At the place of intersection there are concurrent rights; neither the traveler on the common highway nor the railroad company have exclusive right of passage. Even on a common highway travelers must look out for the approach of other vehicles."

The Supreme Courts of other States are in accord. We have examined the following cases:

In Massachusetts:

Butterfield v. *The Western Railway Corporation*, 10 Allen, 552;

Wheelock v. *The Boston & Albany Railroad Company*, 105 Mass., 207;

Woodson v. *The Old Colony & Newport Railroad Company*, 100 Mass., 208;

Burns v. *The Boston & Lowell Railroad Company*, 101 Mass., 53;

Lucas, Adm'r, v. *The Taunton & New Bedford Railroad Company*, 6 Gray, 71.

In New York:

Wild v. *The Hudson River Railroad Company*, 29 N. Y. 325;

Havens v. *The Erie Railroad Company*, 41 N. Y.;

Ernst v. *The Hudson River Railroad Company*, 39 N. Y., 61;

Wilcox v. *The Rome & Watertown Railroad Company*, 39 N. Y., 358;

Davis v. *The New York Central & Hudson River Railroad Company*, 47 N. Y., 400;

Wilds v. *The Hudson River Railroad Company*, 24 N. Y., 430;

Gorton v. *The Erie Railway Company*, 45 N. Y., 660;

Steves v. *The Oswego & Syracuse Railroad Company*, 18 N. Y., 422;

Sheffield v. *The Rochester & Syracuse Railroad Company*, 21 Barber, 341;

Gonzales v. *The New York & Harlem Railroad Company*, 38 N. Y., 440.

In New Jersey:

Morris & Essex Railroad Company v. *Harlam et al.*, 33 N. J., 149;

Telfer v. *The Northern Railroad Company*, 30 N. J., 208;

Pennoyer v. *The Central Railroad Company*, 25 N. J., 558.

In Indiana:

Toledo & Wabash Railroad Company v. *Shuckman, Adm'r,* 50 Ind., 44;

The Pittsburgh, Fort Wayne & Chicago Railroad Company v. *Varney,* 27 *Ind.,* 513;

Lafayette & Indianapolis Railroad Company v. *Hoffman,* 28 Ind., 207;

The Toledo & Wabash Railroad Company v. *Goddard,* 25 Ind., 190.

In Illinois:

The Chicago, Rock Island & Pacific Railroad Company v. *Sill,* 19 Ill., 500;

The Galena & Chicago Union Railroad Company v. *Dill,* 22 Ill., 271;

The Chicago & Alton Railroad Company v. *Gretzner,* 46 Ill., 82;

The Chicago & North-Western Railway Company v. *Sweeney,* 52 Ill., 327.

V.

The Court was also asked to instruct the jury:

"If the jury believe, from the evidence, that Mrs. Houston had notice in any other way of the approach of the train, or could have known it by the exercise of strict care and watchfulness on her part; or if she knew or ought to have known that it was train time; or if she saw the train or could have seen it by looking; or if she heard it, or could have heard it by listening, or in time to avoid the injury, and went and walked upon defendant's track without first ascertaining that she could go or walk on said track in safety to herself, they will find for defendants."

This was refused as asked, and a generalization given in its place. That the propositions stated are sound, cannot be doubted. It was the right of the defendant to have them expressed definitely and precisely. They were given in a form so general and vague as to make little or no impression upon the mind of a jury over willing to find the defendant guilty.

Will it be questioned that if Mrs. Houston knew that the train should arrive at that time, that it was her duty to remain off the track until she had ascertained she could walk thereon in safety?

VI.

The Court was also asked to instruct the jury (Rec. p. 31, fol. 61, § 8), that —

"The duty enjoined by law upon railroad companies to ring the bell and sound the whistle, is only for the benefit of persons traveling along the public highway, and not for the benefit of persons walking along the railroad track; and if the jury believe, from the evidence, that Mrs. Houston was injured at a point on defendant's road which was not a street crossing, plaintiff cannot have a right to recover in this case, based on a failure of defendant to sound the bell or whistle on their locomotive."

This was not only refused by the Court, but the jury was charged, upon the plaintiff's motion, that,

— "it was the duty of defendant's servants and employes managing and operating the locomotive and train of cars which inflicted the injury complained of, to ring the locomotive bell at least eighty rods from the place where the railroad crosses any traveled public street, and any failure to ring such bell is negligence, and if this negligence caused the injury sued for, the defendant is liable, if the plaintiff's wife used reasonable and proper care to avoid such injury." (Rec., p. 29, fol. 57.)

Again, in an instruction given by the Court, on its own motion, the failure to ring a bell or sound a whistle was treated as negligence upon the part of the Company, without regard to the fact that the deceased received her injury on the private right of way, instead of at a public crossing.

The statute of the State of Missouri, pertinent to the instruction under review, is in the language following:

"§ 38. A bell shall be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street; or a steam

whistle shall be attached to each locomotive engine, and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall have crossed such road or street, under a penalty of twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railroad, to be sued for by the Circuit Attorney of the proper Circuit, within ten days after such penalty was incurred; one-half thereof to go to the informer, and and the other half to the county; and said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." (1 Wag., 310, § 38.)

(1) The instruction given by the Court assumes that there was evidence tending to show that deceased was struck at the crossing of the road or street, while the record shows that there was no evidence tending, even remotely, to establish that fact. It was error to give the instruction for that reason.

Michigan Bank v. *Eldred,* and the other cases cited *supra.*

(2) It was also assumed in the instruction given (as clearly appears from the refusal of the instruction asked by the defendant), that the statute was designed for the protection of persons upon the private right of way, as well as upon public crossings.

At the date of the trial, the Supreme Court of the State of Missouri had given the statute a construction, holding that it was intended *only for the benefit of persons at public crossings.*

Rohback v. *Pacific Railroad Company,* 43 Mo., 187.

This case, thus holding, is approved in another,

Evans v *Atlantic & Pacific Railroad Company,* 62 Mo., 52.

And both are in accord with cases in other States, construing similar statutes:

Hadley v. *Central Railroad Company,* 42 N. Y., 469.
O'Donnell v. *Prov. & W. Railroad Company,* 6 R. I., 211.
People v. *N. Y. Central Railroad,* 15 Barb., 199.

If there was a conflict of evidence as to the point where Mrs. Houston received her injury, the defendant was entitled to the instruction asked, but refused by the Court. As there was no conflict of evidence as to the point of collision, the Court erred in the instructions given upon its own and plaintiff's motion, first in assuming there was evidence tending to show that the accident occurred at a public crossing, and, second, in so construing the statute as to make it operative for the protection of persons who were trespassers upon the private right of way.

VII.

Upon the application of plaintiff, the jury was charged:

"It was the duty of the railroad company, in running its cars through towns and villages, to slacken the speed thereof to a moderate and prudent rate: *and the deceased, in the absence of circumstances to put her upon her guard, had a right to presume that the train in question would be so managed, and that the proper signals would be given:* and unless the jury believe from the evidence that the employes of the defendant conformed to these requirements in this case, then they were guilty of negligence, and if this negligence caused the injury sued for, the defendant is liable, if the plaintiff's wife used reasonable and proper care to avoid the injury." (Rec., p. 29, fol. 56.)

The effect of this instruction upon the mind of the jury is apparent. It was, when considered in connection with the evidence, equivalent to saying: "Care and caution were not required of the deceased when upon the defendant's private right of way, in a village, at the time when a train was due, until some 'circumstances put her upon her guard' as to the speed of the train. She had the right to presume that the train due at that time would be operated in such manner as to enable her to pass along the track in safety, and to act upon this presumption until warned by some 'circumstance' of the rapid rate of speed." This is not the law as to travelers upon public crossings, and is manifestly untenable as to trespassers upon the private right of way.

VIII.

The jury was also told:

—"unless you believe upon the evidence that the plaintiff's wife, under all the circumstances, did not use that degree of care to discover or avoid the injury, which persons ordinarily, under JUST such circumstances, would have used, the plaintiff cannot recover." (Rec., p. 33, fol. 66.)

This instruction is objectionable for two reasons:

First: It does not correctly state the rule by which conduct is measured with regard to negligence. It assumes as the standard the conduct of *all* persons, including the reckless and the prudent. The rule is: "Negligence consists in omitting to do something a reasonable person would do, or in doing that which a reasonable person would not do."

Second: We respectfully submit, that the conduct of ordinarily prudent persons, under *similar* circumstances, or under circumstances substantially the same as those disclosed by the evidence, was sufficiently limited. This latitude was not allowed to the jury. The standard of the Court was the conduct of persons "*ordinarily*" under "JUST such circumstances." No man on that jury, or any other, ever saw or heard of two collisions *just* alike in all of the circumstances attending them. It was morally impossible to measure the conduct of the deceased by the standard fixed. The mischief of the instructions did not lie chiefly in this direction. It suggested to the jury a pretext upon which all standards could be disregarded.

Respectfully submitted,

THOS. F. WITHROW,

For the plaintiff in error.

SUPREME COURT OF THE UNITED STATE

No. 109.

Error to the Circuit Court of the United Sta
for the Western District of Missouri.

THE CHICAGO, ROCK ISLAND & PACIF
RAILROAD COMPANY, Plaintiff in Error,

vs.

HAMILTON HOUSTON.

Filed ..... *day o*

..... *A. D. 1877*

..... *Clerk*

ARGUMENT

OF

THOMAS F. WITHROW,

FOR THE PLAINTIFF IN ERROR.

Supreme Court of the United States,

No. 109.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff in Error.*

vs.

HAMILTON HOUSTON, *Defendant in Error.*

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

St. Joseph Steam Printing Co., Printers, St. Joseph, Mo.

UNITED STATES OF AMERICA, } ss.

In the Supreme Court,

OCTOBER TERM, 1877.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HAMILTON HOUSTON, DEFENDANT IN ERROR.

STATEMENT OF CASE BY DEFENDANT IN ERROR.

On the 11th day of March, A. D. 1873, the defendant in error (plaintiff below) commenced this suit in the Circuit Court of Clinton County, Missouri, by duly filing his petition in said Circuit Court, alleging that the defendant, the Chicago, Rock Island & Pacific Railroad Company (plaintiff in error here) was at the time, and on and before the 13th day of December, A. D. 1872, a consolidated railroad corporation, composed of the Chicago & Rock Island Railroad Company incorporated under the laws of the State of Illinois, and the Chicago, Rock Island & Pacific Railroad Company, duly incorporated under the laws of the State of Iowa, which

companies, subsequent to their incorporation and prior to the date aforesaid, consolidated under the corporate name of The Chicago, Rock Island & Pacific Railroad Company; that on the said 13th day of December, A. D. 1872, the said defendant was operating a railroad known as the Chicago & Southwestern Railroad through various parts of Missouri, and in and through the town or village of Cameron, in Clinton County, Missouri, and was running and managing locomotives, cars and trains of cars on said railroad, by its agents, officers, servants and employees; that while so operating said road and running, conducting and managing a certain locomotive engine and train of cars on the said 13th day of December, A. D. 1872 upon the said Chicago & Southwestern Railroad, and in and through the said town of Cameron, the said defendant, by the negligence, unskillfulness and criminal intent of its officers, agents, servants and employees, at said time and place, run said locomotive engine and train of cars against, upon and over one Mary Houston and then and there and thereby crushed, mangled and mutilated her, the said Mary Houston, so that she died on the said 13th day of December, A. D. 1872, from the injuries thereby caused and so inflicted; that on the said 13th day of December, A. D. 1872, and at the time of her injury and death, as aforesaid, the plaintiff, Hamilton Houston, was the lawful husband of the said Mary Houston.

Plaintiff prays that, "by virtue of the second section of the act for 'the better security of life, property and character,' chapter forty-three, Wagner's Missouri Statutes, he may have judgment against defendant for five thousand dollars damages, for cost of suit and all other proper relief."

Upon said petition, a writ of summons was duly issued and duly served. Subsequently, the defendant by its attorney filed in the said Clinton Circuit Court a petition with a bond as required by law for the removal of said cause from the said Clinton Circuit Court to the Circuit Court of the

United States, in and for the Western District of Missouri, which petition was granted and an order of removal was made and entered of record in the said Circuit Court of Clinton County.

At the November term of the Circuit Court of the United States, within and for the Western District of Missouri, the defendant filed in said Court its answer to the plaintiff's petition, denying that the officers, agents, servants or employees of defendant did, by negligence, unskillfulness or criminal intent upon their part, or on the part of either of them, run the locomotive, car or train of cars, or either of them, against upon or over one Mary Houston, or that thereby they then and there crushed, mangled or mutilated the said Mary Houston as alleged in the petition. Defendant further answered that the said injuries and death of the said Mary Houston were occasioned by her own carelessness, negligence and recklessness, and not the fault or negligence of defendant or its employees, and that said injuries and death could and would have been avoided by the exercise of ordinary care and prudence. Afterwards, at the same term of said Court, the plaintiff duly filed his reply to defendant's answer, specifically denying in said reply all of the allegations of defendant's answer.

The issues thus made in the cause were submitted under the testimony and the charge of the Court to a jury.

Under the practice in Missouri, the incorporation of plaintiff, the plaintiff's relation to the said Mary Houston as husband, and all other material allegations contained in the petition, and not denied in or by defendant's answer, are admitted to be facts as alleged.

The issues to be tried under the pleadings were—

1st. Whether the defendant, by its officers, agents, servants or employees did, by negligence, unskillfulness or criminal intent upon their part, or on the part of either, injure and cause the death of the said Mary Houston, as alleged.

2d. Whether the injuries and death of the said Mary

Houston were occasioned by her own carelessness, negligence or recklessness and not by the fault or negligence of defendant or its employees, and whether the said injuries and death could and would have been avoided by the exercise of ordinary care and prudence on her part.

The plaintiff's wife, Mary Houston, was struck by a train operated and run by defendant, in the town of Cameron, Clinton County, Missouri, on the evening of December 13th, 1872, between six and seven o'clock, and from the injury thereby inflicted she, on that day, died. The plaintiff and his wife at the time of the accident were living in Cameron, and his house was situated a few feet north of Second Street, near which, and on the south side thereof, the track of defendant's railroad runs nearly parallel. The plaintiff's house is also a few feet east of Harris Street, which crosses Second Street and the tracks of defendant's railroad. On the south side of the tracks of defendant's railroad and a little east of plaintiff's house, the company had a section house near which was a well. On the evening of December 13th, 1872, plaintiff's wife started from her residence with a bucket to go to the well near the section house, and in crossing the tracks of defendant's railroad she received the injury which caused her death. About the time of this occurrence, the conductor and foreman of defendant's construction train—one John Kerwin—was putting his train on a side track and had but just cleared the main track when the passenger train which caused the injury came in from the west. In side-tracking his train, he backed it in from the east and it stood not very far from the section house and well and north of the main track. (See testimony of Kerwin, Printed Transcript, p. 15.) At the same time some freight cars stood on the side track near to and west of the plank crossing of Harris Street, and north of the main line. The crossing was open. What is known as the Hannibal & St. Joseph Railroad Junction is located about seven hundred and fifty feet west of Harris Street. At the "Junction"

there was always more or less switching of cars and trains, and about the same time defendant's train was due two passenger trains were also due on the Hannibal & St. Joseph Railroad, the tracks of which road lay a short distance south of defendant's road. There was some "cut" along the line of defendant's road before reaching Harris Street from the west. When Mrs. Houston was injured there was snow on the ground, and it was about twilight in the evening.

The passenger train which caused the injury, when it reached the Harris Street crossing, was running at an unusual and reckless rate of speed, the testimony of many disinterested witnesses estimating the rate of speed at twenty-five or thirty miles per hour. Neither the bell upon the engine was rung, nor the steam whistle sounded. The speed of the train, even thirty rods west of the depot, was estimated by an employee of defendant standing on the engine of the construction train, at the time on the side track, to be at the rate of about fifteen miles per hour. The train ran past the depot and backed to its usual place of receiving and discharging passengers. After stopping, the conductor of the train was informed by the engineer that he thought he had struck something, and thought it was a man, and, together with the engineer, he went back on the track and found Mrs. Houston lying in the ditch, fifty or sixty feet east of Harris Street.

It is believed and contended by the plaintiff upon the evidence in the case, that, under all the circumstances of the time and place, Mrs. Houston attempted to cross defendant's tracks on the Harris Street crossing, and, as she passed by the freight cars standing upon the side track near the crossing, she was struck by the locomotive of the passenger train at the time running at unusual speed without any warnings or signals of its approach being given; and that the great speed and force of the train, running at least twenty miles per hour, or about thirty feet per second, carried forward the body of Mrs. Houston and threw her into the ditch, about sixty feet

east of Harris Street, where she was found by the conductor as he has testified.

Plaintiff's witnesses, most of whom have no personal interest in the result of this case, are contradicted by some of defendant's witnesses who were defendant's employees and with whom this particular train seems to have been remarkably well filled. In some important particulars, these employees also disagree among themselves.

The Court having charged the jury in the cause, they returned a verdict for the sum of five thousand dollars. The instructions asked by defendant and the charge given by the Court to the jury may be found on pages 29, 30, 31, 32 and 33, of the Printed Transcript.

Defendant, after verdict rendered, filed in Court its motion to set aside the verdict and for a new trial. This motion the Court overruled, and the defendant has brought this cause to the Supreme Court upon a writ of error.

Points and Authorities.

The instructions and charge given by the Court to the jury cover every aspect of this case as presented by the evidence.

I.

As to the negligence of the defendant the Court instructed the jury as follows:

"It (the defendant) is only bound to exercise due and proper "care to prevent injuries to the public by the use and opera- "tion of its trains, but it is bound to use proper precaution to "prevent such injuries." * * * * * *

"It is the duty of the company to comply with the "statute as to warning and signals." Here the Court read the statute,—1 Wagner's Statutes of Mo., p. 310, sec. 38,—and explained its requirement, to the jury. The section read, is as follows:—

"§ 38.—A bell shall be placed on each locomotive engine, "and be rung at a distance of at least eighty rods from the "place where the railroad shall cross any traveled public road "or street; or a steam whistle shall be attached to each locomotive engine, and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall "have crossed such road or street, under a penalty of twenty "dollars for every neglect of the provisions of this section, to "be paid by the corporation owning the railroad, to be sued "for by the circuit attorney of the proper circuit within ten "days after such penalty was incurred, one-half thereof to go

"to the informer, and the other half to the county; and said "corporation shall also be liable for all damages which shall "be sustained by any person be reason of such neglect."

The Court also instructed the jury that—

"It was the duty of defendant's servants and employees "managing and operating the locomotive and train of cars "which inflicted the injury complained of to ring the loco- "motive bell at least eighty rods from the place where the "railroad crosses any traveled public street, and to keep the "same ringing until it shall have crossed such street, and any "failure to ring such bell is negligence, and if this negligence "caused the injury sued for, the defendant is liable, if the "plaintiff's wife used reasonable and proper care to avoid "such injury." (*a*)

"The wife of plaintiff has the legal right, in crossing the "track of defendant upon a public crossing, to rely upon a "substantial compliance on the part of defendant's servants "operating its railway trains, with the duties required of them "by law in the matter of giving signals and warnings of "approach to a street crossing; and if plaintiff's wife, in "crossing the railroad track of defendant, on any traveled "public street or road, was killed by the railway-cars while "being run to and over a public street crossing without giving "the required and usual signals of approach and in conse- "quence of such negligence of the company, and to which kill- "ing the deceased did not directly or indirectly contribute by "her own negligence, then the jury will find for the plain- "tiff." (*b*)

"It was the duty of the railroad company, in running its "cars through towns and villages to slacken the speed thereof "to a moderate and prudent rate; and the deceased, in the "absence of circumstances to put her upon her guard, had a "right to presume that the train in question would be so man- "aged, and that the proper signals would be given; and un- "less the jury believe from the evidence that the employees of

"the defendant conformed to these requirements in this case, "then they were guilty of negligence, and if this negligence, "caused the injury sued for, the defendant is liable, if the "plaintiff's wife used reasonable and proper care to avoid the "injury." (*b*)

"It is also the duty of the company not to run at an "excessive, or dangerous, or unusual rate of speed in towns or "places with compact population. Now, the mere fact that "the company does not comply with its duty in respect to rate "of speed or signals does not necessarily make it liable for an "injury, but it is liable if such omission was the cause of the "the injury, provided the person injured was, under all the "circumstances, using reasonable care to avoid the injury." (*b*)

"If the injury was not caused by the negligence of the "defendant in the respects imputed to it by the plaintiff, of "course you will find for the defendant. But, in actions of "this character, in order to create a liability on the part of "the defendant, there must not only be negligence on the part "of the company, which negligence caused the injury, but "there must be proper and reasonable care on the part of the "injured person to avoid the injury."

In support of the principles of law contained in the instructions of the Court as above set forth, defendant in error cites the following authorities:

(*a*)

1 Wagner's Stat. of Mo., (1870,) p. 310, § 38.
R. R. Co. vs. Whitton, 13 Wall, 270.
Maginnis vs. R. R. Co., 52 N. Y., 215.
Phil. R. R. Co. vs. Hagan, 47 Penn. St., 244
C. B. & Q. R. R., vs. Payne, 59 Ill., 534.
Artz vs. C. & R. I. R. R. Co., 34 Iowa, 158,
and cases therein cited.

(*b*)

R. R. Co. vs. Stout, 17 Wall, 657.
Balt. & O. R. R. vs. Trainor, 33 Md., 542.
Balt. & O. R. R. vs. Boteler, 38 Md., 568.
O'Mara, vs. R. R. Co., 38 N. Y., 445.
Renwick vs. N. Y. C. R. R., 36 N. Y., 132.
Beisiegel vs. N. Y. C. R. R., 34 N. Y., 622.
Richardson vs. N. Y. C. R. R., 45 N. Y., 846.
White vs. Phillips, 15 C. B. N. S., 245.
State vs. Manch. & L. R. R., 52 N. H., 528.
Brown vs. R. R. Co., 50 Mo., 461.
and authorities *cit. supra* (*a*).

II.

Upon the issue as to contributory negligence of the deceased Mrs. Houston, the Court instructed the jury as follows :

"If the jury believe from the evidence that Mrs. Hous-
"ton was guilty of any negligence which contributed to her
"injury in such a manner that if she had not been negligent
"she would not have been injured, they must find for the
"defendants, even though they may find that defendant's
"employees were guilty of negligence in the management of
"the train which caused the injury."

"A railroad company has the right to the exclusive use
"of its track and right of way, except at a public highway or
"street crossing. 'A railroad track is not built to be walked
"upon by the public, and the fact that persons do walk upon
"it, however frequently and however commonly, does not
"change that proposition of law.' If Mrs. Houston was on
"the track of defendant where there was no street or cross-

" ing, she was where she had no right to be ; and being in a " place where she had no right to be, she was bound to use " every reasonable precaution, diligence and care against the " possibility of any damage which might happen to her there. " This was her imperative duty, and it was especially her " duty to be vigilant and watchful to discover the approach of " any train ; and if the jury believe from the evidence that she " was not vigilant and watchful to discover the approach of " the train in proof [and that by the exercise of vigilance and " care she could have so discovered the train in question, run " and managed as it was, and thereby avoided the accident], " they will find for defendants, although they may also believe " from the evidence that defendant's employees did not sound " the whistle of the locomotive in proof, or that they did not " ring the bell or were otherwise negligent."

The foregoing constituted two of the charges which plain-in error requested the Court to give except that portion of the latter embraced in [ ]. The part of the charge so indicated was added by the Court and was, under the evidence, a proper modification of the charge asked by the defendant. (*c*)

The Court also charged the jury that—

" If the plaintiff's wife was injured and killed when upon " or when crossing the track of the company at a place other " than a public crossing or traveled public road or street, she " was bound at her peril to use all proper and reasonable care to " avoid injury, and the care which she was bound to exercise " would depend upon the danger which, as a reasonable being " bound to exercise a reasonable degree of care and prudence, " she ought to have foreseen ; that is, such a degree of care as " persons generally in such circumstances would use (*c*) ; and if " she did not, the plaintiff cannot recover though the company " was also negligent."

" If by the exercise of such a degree of care she might " have heard or seen the train—this train—run as it was on " the particular occasion and thus avoided the injury, the

she was injured by the train on defendant's road, running at an unusual rate of speed without warnings or signals, these circumstances make a case for the jury. (*e*)

To this case also the maxim implies, *injuria non excusat injuriam.*

A trespasser cannot be run down with impunity, even though he be a trespasser. Though a person be injured while unlawfully on the track of defendant's railroad, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, the defendant is liable for the injury. (*f*)

Therefore we contend that under our system of jurisprudence the determination of these several issues of fact under the evidence in this case was within the proper province of a jury.

In support of these propositions we cite the following authorities:

(*d*)

R. R. Co. vs. Stout, 17 Wall, 661.
Smith vs. R. R. Co., 61 Mo., 588.
Brown vs. H. & St. J. R. R., 50 Mo., 461.
Burham vs. Railroad Co., 56 Mo., 338.
Southworth vs. O. C. & N. R. R. Co., 105 Mass., 342.
Mayo vs. B. & M. R. R. Co., 104 *ib*, 157.
Webb vs. Railroad Co., 57 Maine, 117.
C. & P. R. R. vs. Rowan, 66 Penn. St., 393.
Pfau vs. Reynolds, 53 Ill., 212.
B. & O. R. R. vs. Fitzpatrick, 35 Md., 32.
Quimby vs. Vt. C. R. R. Co., 23 Vt., 387.
Briggs vs. Taylor, 28 *ib.*, 180.
Hill vs. Haven, 37 *ib.*, 501.
Bradley vs. R. R Co., 2 Cush., 539.

(*e*)

Artz vs. C. & R. I. R. R. Co., 34 Iowa, 160.
O'Mara vs. R. R. Co., 38 N. Y., 445.
Renwick vs. N. Y. C. R. R., 36 *ib.*, 132.
Beisiegel vs. N. Y. C. R. R., 34 *ib.*, 622.
Telfer vs. N. R. R. Co., 30 N. J., 188.
Union R. R. Co. vs. Dill, 22 Ill., 264.
Tabor vs. M. V. R. R. Co., 46 Mo., 353.
Kennadye vs. Pacific R. R. Co., 45 *ib.*, 255.
M. & C. R. R. Co. vs. Hunter, 11 Wis., 160.
Richardson vs. N. Y. C. R. R. Co., 45 N. Y., 846.
Maginnis vs. R. R. Co., 52 *ib*, 215.
Phil. R. R. Co. vs. Hagan, 47 Penn. St., 244.

(*f*)

See R. R. Co. vs. Stout, 17 Wall, 659, and authorities cited *supra* (*e*).

IV.

The Court also properly charged the jury, as to the burden of proof, as follows :

"The burden of proof is on the plaintiff to show that the company was negligent and that the negligence caused the injury sued for."

"If the plaintiff makes out a case of this kind upon the "evidence produced by him, and if the defendant relies to "defeat the action upon the proposition that the person injured "was also negligent in a degree which materially contributed "to the injury, and thus defeat a recovery, the burden of proof "to establish such negligence is upon the defendant. So it "has been decided by the Supreme Court of the United "States."

"Negligence of the deceased if it existed, is a matter of "defense and it devolves upon the defendant to establish it, "if it does not appear upon the evidence produced by the "plaintiff."

Railroad Co. vs Gladmon, 15 Wallace, 406.

Quoting with approval Oldfield vs. N. Y. & H. R. R., 3 E. D. Smith. S. C. (affirmed), 14 N. Y., 310.

Thompson vs. Railroad Co., 51 Mo., 190.

Railroad Co. vs. Weber, 72 Penn. St., 27.

C. & P. R. R. Co. vs. Rowan, 66 Penn. St., 393.

V.

The Missouri Statute which gives to plaintiff his right of action in this case and fixes the amount of damages to be recovered is as follows:

"§ 2.—Whenever any person shall die from an injury, "resulting from or occasioned by the negligence, unskilful- "ness or criminal intent of any officer, agent, servant or "employe, whilst running, conducting or managing any loco- "motive, car or train of cars; or of any master, pilot, engi- "neer, agent or employe, whilst running, conducting or man- "aging any steamboat or any of the machinery thereof; or of "aging any steamboat or any of the machinery thereof; or of "any driver of any stage coach, or other public conveyance, "whilst in charge of the same as a driver; and when any "passenger shall die from any injury resulting from or occa- "sioned by any defect or insufficiency in any railroad, or any "part thereof; or in any locomotive or car, or in any steamboat "or the machinery thereof, or in any stage coach or other "public conveyance, the corporation, individual or individ- "uals, in whose employ any such officer, agent, servant, em- "ploye, master, pilot, engineer or driver, shall be at the time such "injury is committed, or who owns any such railroad, locomo- "tive car, stage, coach or other public conveyance at the time "any injury is received, resulting from or occasioned by any "defect or insufficiency above declared, shall forfeit and pay "for every person or passenger so dying the sum of five thou- "sand dollars, which may be sued for and recovered: First, "by the husband or wife of the deceased, &c."

1 Wagner's Mo. Stat., (1870) p. 519, § 2.

Of Counsel for Def't in Error